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# **TOWARDS AN INTEGRATED REGIME FOR THE PROSECUTION OF INTERNATIONAL CRIMES**

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# ABSTRACT

Abstract for the thesis “Towards an Integrated Regime for the Prosecution of International Crimes” presented by Robert Cryer to the University of Nottingham for the degree of Doctor of Philosophy, September 2000.

This thesis investigates the extent to which there is an integrated system of prosecution of international crimes, involving the prosecution of international crimes by national and international criminal tribunals operating in tandem. It also seeks to investigate the extent that the values protected by international criminal law have been accepted into the structure of international society and how they have altered it. It does these things by looking at two different aspects of the prosecution of international crimes. First, how international criminal tribunals have overcome the problems encountered by national courts and the structural inadequacies of the bilateral, inter-State model of the nature of the international system. Secondly, it investigates whether or not international criminal tribunals have managed to avoid the criticism that the actual enforcement of universal crimes has been selective, and primarily directed against suspects who are not affiliated with the regime that is prosecuting them. It concludes that international criminal tribunals have, to differing extents overcome the problems of national courts and the supposed bilateral nature of international system. Selectivity, both in terms of who is prosecuted, and what they are prosecuted for, remains a problem. Although the coming into being of the ICC will alleviate some of the jurisdictional selectivity *rationae personae*, particularly as it creates a powerful national interest for States to prosecute offences by their own officials, nationals, or occurring on their territory,

the definitions of crimes in the Rome Statute mean that selectivity in relation to the law applied remains, to some extent, problematic.

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This thesis is up to date to Easter 2000. Where possible, developments occurring after that date have been incorporated.

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#### DECLARATION

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I declare that this thesis is my own work and it has not, in whole or in part previously been presented by me to this or any other university for the conferment of any degree.

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*A.B.A.J.*- American Bar Association Journal

*A.D.*- Annual Digest of International Law Cases

*A.J.I.L.*- American Journal of International Law

*A.P.*- Academic Press

*A.P.S.R.*- American Political Science Review

*A.U.I.L.R.*- American University International Law Review

*A.U.J.I.L. & Policy*- American University Journal of International Law and Policy

*Albany L.R.*- Albany Law Review

All ER- All England Reports

API- Protocol I Additional to the Geneva Conventions of 12 August 1949

APII- Protocol II Additional to the Geneva Conventions of 12 August 1949

*Arizona J.I. & C.L.*- Arizona Journal of International and Comparative Law

*B.C.T.W.L.J.*- Boston College Third World Law Journal

*B.Y.B.I.L.*- British Yearbook of International Law

BFSP- British Foreign and State Papers

*Brooklyn J.I.L.*- Brooklyn Journal of International Law

*C.H.R.L.R.*- Columbia Human Rights Law Review

*C.J.T.L.*- Columbia Journal of Transnational Law

*C.Y.B.I.L.*-Canadian Year Book of International Law

*Cal. L.R.*- California Law Review

*Cal. W.I.L.J.*- California Western International Law Journal



*Cam. L.J.*- Cambridge Law Journal

*Case W.R.J.I.L.*- Case Western Journal of International Law

*C.L.P.*: Current Legal Problems

*Columbia L.R.*- Columbia Law Review

*Connecticut J.I.L.*- Connecticut Journal of International Law

*Cornell I.L.J.*- Cornell International Law Journal

*Crim. L.F.*- Criminal Law Forum

*Crim.L.R.*- Criminal Law Review

*De Paul.L.R.*- De Paul Law Review

*Denver.J.I.L.& Pol.*- Denver Journal of International Law and Policy

*Dickinson J.I.L.*- Dickinson Journal of International Law

*Duke J. C. & I.L.*- Duke University Journal of Comparative and International Law

*E.E.H.R.R.*- East European Human Rights Review

*E.J.Crim.Crim.L. & Crim. Just.*- European Journal of Crime, Criminal Law and Criminal Justice

*E.J.I.L.*- European Journal of International Law

*E.T.S.*- European Treaty Series

*Emory I.L.R.*-Emory International Law Review

*Ethics & I. Aff.*- Ethics and International Affairs

*European H.R.L.R.*- European Human Rights Law Review

*Fl.F.Wld.Aff.*- Fletcher Forum of World Affairs

*Fordham I.L.J.*- Fordham International Law Journal

*Foreign Aff.*- Foreign Affairs

*G.Y.B.I.L.*- German Year Book of International Law

*GA*- United Nations General Assembly

*Ga.J.I. & C.L.*- Georgia Journal of International and Comparative Law

GC- Geneva Convention

*H.R.L.J.*- Human Rights Law Journal

*H.R.Q.*- Human Rights Quarterly

*Harv. H.R.J.*- Harvard Human Rights Journal

*Harv. I.L.J.*- Harvard International Law Journal

*Houston J.I.L.*- Houston Journal of International Law

*I. Aff.*- International Affairs

*I. Conciliation*- International Conciliation

*I. Lawyer*- International Lawyer

*I. Peacekeeping*- International Peacekeeping

*I.C.J. Rep.*- International Court of Justice Reports

*I.C.L.Q.*- International and Comparative Law Quarterly

*I.L. & A.C.C.*- International Law and Armed Conflict Commentary

*I.L.M.*- International Legal Materials

*I.L.Q.*- International Law Quarterly

*I.L.R.*- International Law Reports

*I.L.S.A. J.I & C.L.*- International Law Student's Association Journal of International and Comparative Law

*I.R.R.C.*- International Review of the Red Cross

ICC- International Criminal Court

ICJ-International Court of Justice

ICRC- International Committee of the Red Cross

ICTR-International Criminal Tribunal for Rwanda

ICTY-International Criminal Tribunal for Former Yugoslavia

IFOR- Implementation Force

*Indian J.I.L.*- Indian Journal of International Law

*Indian Y.B.I. Aff.*- Indian Year Book of International Affairs

*Is.L.R.*- Israel Law Review

*Is.Y.B.H.R.*- Israel Year Book of Human Rights

*J.A.C.L.*- Journal of Armed Conflict Law

*J.C.S.L.*- Journal of Conflict and Security Law

*J.L. & Society*- Journal of Law and Society

*J.L.& Social Inquiry*- Journal of Law and Social Inquiry

*L. & Contemporary Problems*- Law and Contemporary Problems

*L.J.I.L.*- Leiden Journal of International Law

*L.L.A.I. & C.L.J.*- Loyola of Los Angeles International and Comparative Law  
Journal

*L.Q.R.*-Law Quarterly Review

*L.R.T.W.C.*- Law Reports, Trial of War Criminals

LNTS- League of Nations Treaty Series

*M.L.R.*-Modern Law Review

*Malaysian L.J.*- Malaysian Law Journal

*Max Planck Y.B.U.N.L.*- Max Planck Year Book of United Nations Law

*McGill. L.J.*- McGill Law Journal

*Melb.U.L.J.*- Melbourne University Law Journal

*Mich. J.I.L.*- Michigan Journal of International Law

*Military L.R.*- Military Law Review

MLA- Mutual Legal Assistance

MUP- Manchester University Press

N.C.- North Carolina

*N.I.L.R.*- Netherlands International Law Review

*N.J.C.L.*- National Journal of Constitutional Law

*N.J.I.L.*- Nordic Journal of International Law

*N.Q.H.R.*- Netherlands Quarterly of Human Rights

*N.Y.L.S.J.H.R.*- New York Law School Journal of Human Rights

*N.Y.L.S.J.I. & C.L.*- New York Law School Journal of International and Comparative Law

*N.Y.R.*- New York Review of Books

*N.Y.U.J.I.L. & Politics*- New York University Journal of International Law and Politics

NATO-North Atlantic Treaty Organisation

*Nordic J.I.L.*- Nordic Journal of International Law

Nuremberg IMT- Nuremberg International Military Tribunal

OUP- Oxford University Press

*P.Y.B.I.L.*- Polish Year Book of International Law

p-5-Permanent members of the Security Council (China, France, Russia, UK, US)

*Pace I.L.R.* Pace University International Law Review

PAUTS- Pan American Union Treaty Series

*Proc. A.S.I.L.*- Proceedings of the American Society of International Law Annual Meeting

*R.A.D.I.C.*-African Journal of International and Comparative Law

*R.B.D.I.*- Revue Belge de Droit Internationale

*R.d.C.*- Recueil des Cours, l'Académie de Droit International

*R.I de Dr. Pénal*- Revue Internationale de Droit Pénale



*Rev.Dr. Mil et Dr. de la Guerre*- Revue de Droit Militaire et Droit de la Guerre

*S.A.L.J.*- South African Law Journal

*S.A.Y.B.I.L.*- South African Year Book of International Law

*S.Af.Crim.L.R.*- South African Criminal Law Reports

*S.Cal. L.R.*- Southern California Law Review

*S.Ct.L.Rev.*- Supreme Court Law Review

SC- United Nations Security Council

SFOR- Stabilisation Force

SOFA- Status of Forces Agreement

*St. J.L.C.*-St. John's Journal of Legal Commentary

*Stanford J.I.L.*- Stanford Journal of International Law

*Syracuse J. of I.L. & Commerce*- Syracuse Journal of International Law and Commerce

*Temple I. & C.L.J.*- Temple International and Comparative Law Journal

*Temple L.Q.*- Temple Law Quarterly

*Tex. I.L.J.*- Texas International Law Journal

*Tex. L.R.*- Texas Law Review

Tokyo IMT- Tokyo International Military Tribunal

*Transnational L & Contemporary Problems*-Transnational Law and Contemporary Problems

*Tul.L.R.*- Tulane Law Review

*Tulane J.I. & C.L.*- Tulane Journal of International and Comparative Law

*U.C.L.A.J.I.L. & Foreign Aff.*- University of California, Los Angeles Journal of International Law and Foreign Affairs

*U.C.L.A.P.B.L.J.*- University of California, Los Angeles Pacific Basin Law Journal

*U.N.B.L.J.*- University of New Brunswick Law Journal

U.P.-University Press

*U.Pa.L.R.*- University of Pennsylvania Law Review

UK- United Kingdom

UKTS- United Kingdom Treaty Series

UN- United Nations

UNTS- United Nations Treaty Series

US- United States of America

*V.J.I.L.*- Virginia Journal of International Law

*Vanderbilt J.T.L.*- Vanderbilt Journal of Transnational Law

W.C.R.- War Crimes Reports

*Washburn L.J.*- Washburn Law Journal

WLR-Weekly Law Reports

*Y.B.I.H.L.*- Year Book of International Humanitarian Law

*Y.B.Wld.Aff.*- Year Book of World Affairs

*Yale I.L.J.*- Yale Journal of International Law

*Yale L.J.*- Yale Law Journal

# INTRODUCTION

## PRELIMINARIES

This is a thesis about the enforcement of international criminal law. Having started so baldly, some explanations are in order. It is the purpose of this introduction to provide them. The basic idea of this thesis is that there are the beginnings of a system of international criminal law enforcement integrating both national and international mechanisms. The bulk of the thesis is taken up by an analysis of the extent to which this system does, or does not, represent an improvement over the pre-existing system of national enforcement. Most previous discussions of the prosecution of international crimes have separated treatment of what Bassiouni describes as the direct and indirect enforcement systems.<sup>1</sup> This is despite the fact that Bassiouni recognises that “the ideal enforcement system for ICL [international criminal law] is a combination of a direct enforcement system, one in the form of a permanent international criminal tribunal... and an effective indirect enforcement system... the two approaches are complementary and necessary to one another”.<sup>2</sup> Since the creation of the two UN tribunals (the International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)) and the promulgation of the Rome Statute, the study of the interlinkages between the two structures of prosecution has become imperative. The best way to see the International Criminal Court (ICC) (which the Statute will create when it enters into force) is as a back-stop designed to operate when national courts do not, and as an incentive for States to prosecute international crimes diligently. From an institutional

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<sup>1</sup> See M.C. Bassiouni, “The Sources and Content of International Criminal Law: A Theoretical Framework”, in M.C. Bassiouni (ed.), *International Criminal Law Vol I: Crimes* (NY: Transnational, 1999) 3, pp.13-14. The “direct enforcement system” “applies when an internationally created organ enforces the *rationae materiae* (norms) of ICL [international criminal law] to the *rationae personae* (subjects) of ICL”, *ibid.* The “indirect enforcement system” “relies on the voluntary cooperation of states for investigation, prosecution, adjudication and punishment of those who are sought, accused or convicted of international crimes by interested national criminal justice systems” (*ibid.*, p.14). The essential split is international/national prosecution. Bassiouni’s own collection separates the two “systems” see M.C. Bassiouni (ed.) *International Criminal Law Vol. III: Enforcement* (New York: Transnational, 1999) *passim*.

<sup>2</sup> *Ibid.* p.14.

perspective, it is preferable, in many ways, for national courts to deal with these crimes, as national courts are part of a system of enforcement which includes the police and the prison service.

As a result of the above factors, this study will attempt to provide a conceptual analysis, discussing both national and international responses to international crimes. Each conceptual heading will contain a discussion of an issue that has arisen in the national (or “indirect”) enforcement mechanism, then move on to whether (or not), how and why the international (or “direct”) enforcement mechanisms have transcended the problems that have arisen. It will also attempt to show the effect that the existence of international criminal tribunals has had on the enforcement of international criminal law.

## PRECEPTS

All theses have to have precepts, or be impossibly long and cumbersome. That being a given, it is best to be as open about those precepts as possible. The purpose of this section is to elaborate upon those precepts, and explain why they have been selected.

### *Precept 1: There is a Body of International Criminal Law*

The first precept is that there is such a thing as international criminal law.<sup>3</sup> What this means is that there are certain rules of international law that impose criminal responsibility directly upon the individual, without the necessary mediating influence of national legislation (although that may be necessary for the purposes of national prosecution). This was something accepted by the Nuremberg International Military Tribunal (Nuremberg IMT) in its famous pronouncement that “crimes against

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<sup>3</sup> For support, see G.O.W. Mueller & D. J. Berashetov, “Evolution and Enforcement of International Criminal Law” in Bassiouni, *supra* n.1, 257; E. Greppi, “The Evolution of Individual Criminal Responsibility Under



international law are committed by men, not abstract entities, and only by punishing individuals who commits such crimes can the provisions of international law be enforced... individuals have international duties which transcend the national obligations of obedience imposed by the individual state.”<sup>4</sup> This position has considerable historical pedigree,<sup>5</sup> and has received no convincing academic challenge for half a century.<sup>6</sup> Critics of international criminal law are now limited to castigating statesmen for their invocation of the concept, which they feel will fail on *realpolitik* grounds, rather than being able to wholly reject the concept.<sup>7</sup> Debates are now more fruitfully centring on the contours of the concept, rather than its existence.<sup>8</sup>

Limiting the discussion in this thesis to those rules of international law that directly impose criminal responsibility on individuals involves the exclusion of two other types of rules sometimes referred to under the general rubric of “international criminal law”. The first of these is the controversial concept of international crimes of States, exemplified in

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International Law” (1999) 335 *I.R.R.C.* 531.

<sup>4</sup> “Nuremberg IMT: Judgment and Sentence” *reprinted in* (1947) 41 *A.J.I.L.* 172, p.221. References to the Nuremberg IMT’s judgment in this thesis will be made to this (unofficial) version rather than the official transcript, as the reprint is by far the most widely available for reference.

<sup>5</sup> See H. Lauterpacht, “The Law of Nations and the Punishment of War Criminals” (1944) 21 *B.Y.B.I.L.* 58, p.61 for reference to acceptance of this in the “classical” writers of international law. It is arguable that an English Court, as far back as 1796 applied international law to secure a conviction for distributing unfit food to Prisoners of War, *Treave’s Case* (27<sup>th</sup> April 1796), (1803) 2 *Pleas of the Crown* 821. Zoller, though considers the principle to have fallen into desuetude by this century, E. Zoller, “The Status of Individuals Under International Law” in G. Ginsburgs & V.N. Kudriavtsev, *The Nuremberg Trial in International Law* (Dordrecht: Martinus Nijhoff, 1999) 99, p.100. This fails to take into account not only the law of piracy, but also the acceptances of the concept in the Leipzig Trials and the 1919 Commission.

<sup>6</sup> The most serious challenge to the existence of international criminal law in this sense of the word was G. Schwarzenberger, “The Problem of an International Criminal Law” (1950) 3 *C.L.P.* 263. Schwarzenberger was in a minority at the time, and proceeded on the basis that war crimes were only national crimes over which, exceptionally, international law granted wider jurisdictional competence to States than was usually the case. As will be seen, international law does more than that.

<sup>7</sup> See Alfred P. Rubin’s Jeremiad *Ethics and Authority in International Law* (Cambridge: CUP, 1997) for an example of this. His criticisms (for example of the hypocrisy of States) are well founded, but do not undermine the legality of the concept of individual responsibility. As Colin Warbrick points out, there is no principled reason in international law why there cannot be individual responsibility for crimes under international law, and enforcement by international courts C.W. Warbrick, “The UN System: A Place for International Criminal Courts?” (1995) 5 *Transnational L. and Contemporary Problems* 237, p.261.

<sup>8</sup> See, for example, F. Malekian, “Individual Criminal Responsibility” in Bassiouni, *supra* n 1, 153; K. Ambos, “Individual Criminal Responsibility in International Criminal Law” in G.K. McDonald & O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law Vol I: Commentary* (The Hague: Kluwer, 2000) 1.

Article 19 of the ILC Draft Articles on State Responsibility.<sup>9</sup> Although the types of conduct covered by Article 19 are similar to those discussed in this thesis, the transposition of criminality onto a collective entity like the State is still highly controversial, and has little likelihood of being accepted in the immediate future.<sup>10</sup> The main reason it falls outside the scope of this work is that it does not relate to individual criminal responsibility, but to State responsibility.

The second exclusion is those crimes set up by treaty regimes which require States to prohibit conduct as part of their national law. Treaties of this nature, such as the Vienna Convention Against the Illicit Trafficking in Narcotic Drugs and Psychotropic Substances<sup>11</sup> do not create individual responsibility under international law, but place a duty on the State to criminalise the conduct municipally. Therefore they are conceptually different to the international crimes under discussion herein, as international law does not criminalise such crimes in and of itself. However, the two types of crime have certain aspects of national enforcement in common, so when reference to national suppression is made, it is worth utilising examples from the “treaty crimes” as they were called in the 1993 ILC Draft Statute for an International Criminal Court.<sup>12</sup> As will be seen, the treaty crimes were excluded from the ambit of the international criminal court.<sup>13</sup> This was probably the correct approach to take. International crimes in the sense in which the term is used in this thesis are extremely serious crimes, of such a nature that they are considered to be a matter of concern to all States, and are so serious international law takes the drastic step of directly imposing liability. They are violations of rules which are

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<sup>9</sup> For the first reading see, Report of the International Law Commission on the Work of its Forty-Eighth Session UN. GAOR 51<sup>st</sup> Sess. Supp No 10, p.131. See generally G. Gilbert, “The Criminal Responsibility of States” (1990) 39 *I.C.L.Q.* 345; K. Marek, “Criminalising State Responsibility” (1978-1979) 14 *R.B.D.I.* 460; S. Rosenne, “State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility” (1997-1998) 30 *N.Y.U.J.I.L. & Politics* 145.

<sup>10</sup> At least not in their present form, see J. Crawford, “Revising the Draft Articles on State Responsibility” (1999) 10 *E.J.I.L.* 485, Crawford is the ILC Special Rapporteur on State Responsibility.

<sup>11</sup> 1019 UNTS 175.

<sup>12</sup> Report of the ILC on the Work of its forty fifth Session, Report of the Working Group on a Draft Statute for an International Criminal Court UN GAOR 48<sup>th</sup> Sess. Supp 10 pp.100-132, UN Doc. A/48/CN.4/Ser.A/1993/Add.1. For an attempt to rationalise both types of international crime into one taxonomy see B. Yarnold, “Doctrinal Basis for the International Criminalisation Process” (1994) 4 *Temple I. & Comp. L.J.* 85.

<sup>13</sup> *Infra* pp.280-281.



universally accepted as a matter for concern of the international community as a whole, as the Rome Statute of the International Criminal Court recognised.<sup>14</sup> The same cannot be said for all treaty crimes, such as, for example, interference with submarine cables.<sup>15</sup> Also treaty crimes are often controversial, and not universally accepted, such as drug trafficking.<sup>16</sup> The lack of consensus on treaty crimes was what led to their exclusion from the Rome Statute. As will be seen, the consequences of conduct being prohibited by international criminal law are manifold, and it is far from evident that it is appropriate for all treaty based crimes to be part of this regime.

These exclusions leave only four categories of crime to be discussed: genocide, crimes against humanity, war crimes and the crime of aggression. These four remain as they have been accepted in the latter half of the 20<sup>th</sup> century as the “core” international crimes which international law itself criminalises. This choice is also supported by the fact that to the present day they are the only crimes which have been punished before international criminal tribunals. As will be seen, all four are present in some form in the Rome Statute.<sup>17</sup> They are also the crimes which comprised the streamlined ILC Draft Code of Crimes Against the Peace and Security of Mankind.<sup>18</sup> The Draft Code declared (in Article 1) that “Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law”, which shows that they were looking at international crimes in the sense that this thesis does.

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<sup>14</sup> Rome Statute for the International Criminal Court (hereinafter “Rome Statute”) A/CONF.183/9, (1998) 37 *I.L.M.* 999 preamble.

<sup>15</sup> Contrary to the 1982 United Nations Convention on the Law of the Sea, 516 UNTS 205, Article 113.

<sup>16</sup> 1988 Vienna Convention Against the Illicit Traffic in Narcotic Drugs and Other Psychotropic Substances, Article 1.

<sup>17</sup> Rome Statute, Article 5.

<sup>18</sup> Draft Code of Crimes Against the Peace and Security of Mankind, in Report of The International Law Commission on the Work of its Forty-Eighth Session, U.N Doc. A/51/10, Articles 16-20. This study treats crimes against UN Personnel (Article 19) as the Rome Statute does, as war crimes. The Commentary to Article 1 of the Draft Code (paragraph 2) claims that it was no intended to suggest that the list in the draft was exhaustive. That must be read in the light of the fact that their previous attempts to expand the list, for example in the 1991 met with controversy and, ultimately, rejection. For a study of the fate of the crimes suggested in the 1991 Code, see L.S. Sunga, *The Emerging System of International Criminal Law* (The Hague: Kluwer, 1997).

## *Precept 2: Prosecution is Usually the Correct Response to Violations of International Criminal Law*

The second precept comes from the acceptance of the existence of international criminal law. This is that by setting up a body of international criminal law, States have accepted that, at least in the abstract, the usual response to violations of that law should be prosecution. A similar position can be inferred from the portion of the Nuremberg IMT judgment cited above (p.3) That is not to deny the possibility of other responses, but to assert the primacy of a penal response. After all, criminal law is distinguishable from civil law on the ground that the sanctions imposed are primarily penal in nature, rather than compensatory. Activities like truth commissions, civil remedies and reparations also have a place in responding to violations of international criminal law (as they do in relation to violations of national criminal law). As will be seen, there is no all-encompassing duty to extradite or prosecute persons suspected of such violations, and where there is no such duty, it may be possible to use other responses in substitution for prosecutions, and use amnesties.<sup>19</sup> However, this must be seen as a deviation from the normal response, and a derogation from what is the most appropriate response in most situations, prosecution.<sup>20</sup>

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<sup>19</sup> See, for example, M.P. Scharf,; "The Amnesty Exception to the Jurisdiction of the International Criminal Court" (1999) 32 *Cornell I.L.J.* 507; J. Dugard, "Reconciliation and Justice: The South African Experience" (1998) 8 *Transnational L. & Contemporary Problems* 277. For a defence of the South African approach see K. Asmal, "Truth, Reconciliation and Justice The South African Experience in Perspective" (2000) 63 *M.L.R.* 1, for a philosophical defence of the Argentine approach see C.S. Nino, *Radical Evil on Trial* (New Haven: Yale U.P., 1996). A recent, primarily utilitarian appraisal of the various methods of dealing with atrocities is M. Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998). For a superb discussion of some of the moral problems in this area see M. Osiel, "Why Prosecute? Critics of Punishment for Mass Atrocity" (2000) 22 *H.R.Q.* 118. Much of the literature advocating the use of amnesties, it must be noted, relates to the situation where the abuses of a past (presumed non-democratic regime) fall to a new (democratic) regime, and that an amnesty may be the price of democracy. This excludes the situation where democracies must punish their own offences, or non-democratic regimes come into power. For an argument that there is a moral duty on democracies to punish Nazi crimes see A. Rosenbaum, *Prosecuting Nazi War Criminals* (Boulder: Westview, 1993).

<sup>20</sup> As Solzenitsyn said in *The Gulag Archipelago* (London: Harvill, 1999) "It is unthinkable in the twentieth century to fail to distinguish between what constitutes an abominable atrocity that must be prosecuted and what constitutes the 'past' which 'ought not to be stirred up'" (p.81) "Fie!, What naturalism. Why keep talking about all that? And that is what they usually say today, those who did not themselves suffer, who were themselves the executioners, or who have washed their hands of it, or who put on an innocent expression: Why rake over all that? Why rake over old wounds (Their wounds!!)" (*ibid.*, p.228). Mark Osiel expresses the sentiment, in a different context to Solzhenitsyn, "The harm wrought by state sponsors of mass atrocity is so colossal that even skeptics of the criminal law's coherence and defensibility find themselves longing for their



As prosecution is considered, for the most part, the most appropriate response, the central focus of this thesis is the extent to which we have a regime that is effective and credible, as it is only such a regime that can fully vindicate the laws in question.

*Precept 3: The International System is Value Based, but These Values are not Immutable*

The third precept relates to the nature of international society. The precept is this: the international system is capable of embodying values, and those values may change to reflect the current status of international society (or community). As George Abi-Saab makes clear, the debates about whether we have an international society or an international community are not discussing the right questions, a more fruitful topic of inquiry is the “degree of intensity of the sense of the community prevailing among the members of international society... rather than referring to a group as a community in general, it is better, for the sake of precision, to speak of the degree of community existing within the group in relation to a given subject, at a given moment”.<sup>21</sup> The rise of new values may have an impact on the content of the law, as for example the necessities of international trade caused a rejection of the absolute theory of State immunity, which was based on the absolute sovereignty ideal.<sup>22</sup> What the rise of new values does not do is change the law, but they provide impetus for change within the system.

It would be unforgivably myopic to see the pure positivist, Statist idea of international law as value-neutral. As Phillip Allott recognises, the alleged Hobbesian state of nature which exists between States in the international realm serves the interests of the

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doubts to be allayed, at least for perpetrators such as these. In the face of such monstrous wickedness, retributive impulses emerge powerfully even in the most critical of our practices of punishment and their underlying assumptions. If ever there were an ‘easy case’ (in the moral sense, at least) for criminal punishment, surely this is it. Or so one would suppose” (*ibid.* p.118) Osiel devotes the rest of the article to a qualified rebuttal of arguments against prosecution.

<sup>21</sup> G. Abi-Saab, “Whither the International Community?” (1998) 9 *E.J.I.L.* 248, pp.248-249.

<sup>22</sup> See e.g. M. Shaw, *International Law* (Cambridge: Grotius, 4<sup>th</sup> ed, 1997) pp.490-499.

powerful, thus has their freedom as a value.<sup>23</sup> Feminist critiques of international law have also shown how the traditional conception and structure of international law privileges certain interests they identify as male.<sup>24</sup> In addition, the pure Statist version of the international system consisting entirely of States with supreme authority over all in their territory and the type of international law that entailed no longer<sup>25</sup> reflects reality.<sup>26</sup> Positivism has had to alter from this view to maintain its claim to be reflective of actuality. Positivists have come to accept that the nature of the international system is not immutable, and new values may be being reflected within it.<sup>27</sup> These positivists include some of the staunchest critics of attempts to alter the international system.<sup>28</sup> Many of the works traditionally considered Utopian are best read as proposals for a reorientation of the values accepted in the system.<sup>29</sup> Their Utopianism, if that is what it is, does not relate to the possibility of a change in values,<sup>30</sup> but the extent of the change they advocate. The prohibitions involved in international criminal law as the term is used here protect values

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<sup>23</sup> P. Allott, *Eunomia*, (Oxford: OUP, 1990) pp.248-249, "Such was, and is, the Vattel tradition and the Vattel reality flowing from it. It is a reality which was welcome to the ruling classes of western Europe... like the ruling classes who had led the way along the same path. The ruling classes of the so called *new states* also welcomed a theory which could give such supersocializing explanation of their own personal power. Misconceived international society became... a world fit for governments", see also P. Jessup *Modern Law of Nations* (New York: Macmillan, 1948), pp.40-41, "the function of sovereignty as a legal concept was to protect the state in a world devoid of any alternative to self protection. The gradual development of adequate modernized law and organization should provide such an alternative".

<sup>24</sup> See H. Charlesworth, C. Chinkin & S Wright, "Feminist Approaches to International Law" (1991) 85 *A.J.I.L.* 613; H. Charlesworth & C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: MUP, 2000).

<sup>25</sup> See B. Simma & A.L. Paulus, "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View" (1999) 93 *A.J.I.L.* 302, p.306.

<sup>26</sup> See O. Schachter, "The Decline of the Nation State and, its Implications for International Law" (1997) 37 *C.J.T.L.* 7, p.7.

<sup>27</sup> The two extended discussions of this from avowed positivists are B. Simma, "From Bilateralism to Community Interest in International Law" (1994) VI 250 *R.d.C.* 217 and C. Tomuschat, "Obligations Arising for States Without or Against Their Will" (1993) IV 241 *R.d.C.* 195.

<sup>28</sup> Rubin, for example, *supra* n.7, p.145 accepts that the international order contains values, but that we have to be very certain of the costs and benefits before advocating change. Prosper Weil, who is widely known for his critique of the ideas of a hierarchy of norms in international law "Towards Relative Normativity in International Law" (1983) 77 *A.J.I.L.* 413 has, more recently accepted not only that the system can change, but has done so. Although the old law "favoured the State and its sovereignty, the international community, of which modern international law is so fond, puts the stress on what brings together rather than on what separates. Reference to the international community transcends the effect of style and fashion: behind the semantic shift what is emerging is evolution in the very conception of the international system" (1992) VI 237 *R.d.C.* 9, p.309, as translated in J.A. Carrillo Salcedo, "Reflections on the Existence of a Hierarchy of Norms in International Law" (1997) 8 *E.J.I.L.* 583.

<sup>29</sup> Allott, for example advocated a reconceptualisation of international law, and Phillip Jessup was express that his work was written *de lege ferenda* (*supra* n.23, p.91).

<sup>30</sup> It cannot be forgotten that both Jessup and Allott were practising Statesmen prior to writing, so cannot be accused of being unaware of the realities of inter-State affairs.



currently in ascendancy in the international community.<sup>31</sup> The rules have effectively universal acceptance amongst States in the abstract, although in practice their application is controversial. As Marcella David puts it: “there is general consensus as to the broad parameters of these norms... A poll of the heads of national governments would elicit statements in agreement with these principles-albeit subject to wildly varying interpretations of their application”.<sup>32</sup>

It would be overly optimistic, to say the least, that the values enshrined in international criminal law have fully superceded the older order of sovereignty-based values, and the tension between these values will be shown by this thesis. It is a more realistic claim to suggest that the newer values are beginning to become visible in the modern international society.<sup>33</sup> Further developments in the acceptance of these values will not come about without more concrete action. One method of ensuring values are inculcated into a system is institutionalisation, i.e. the setting up of institutions reflecting those values.<sup>34</sup> Courts can be one of the institutions that can perform this function.<sup>35</sup> The criminal law is another mechanism of value promotion and protection.<sup>36</sup> It is an aim of this thesis to investigate to what extent institutionalisation has occurred in international

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<sup>31</sup> Tomuschat, *supra* n.27, p.225, “one may legitimately take the recognition of crimes against the peace and security of mankind as another clue for the assumed existence of an international community, whose vital interests it is intended to secure”.

<sup>32</sup> M. David, “Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law” (1999) 20 *Mich. J.I.L.* 337. In the survey of national opinions on the ICC given in R.S. Lee (ed.), *The International Criminal Court* (The Hague: Kluwer 1999) pp.573-639 no State expressed dissent from the idea of international crimes, or that they existed. Disagreement centred on definitions (in the case of war crimes) and the inclusion of aggression, without a definition (not that aggression was an international crime). See also L. Fisler-Damrosch, “Enforcing International Law Through non Forcible Means” (1997) VIII 269 *R.d.C.* 9, p. 197.

<sup>33</sup> See, for example Simma, *supra* n.27, p.234.

<sup>34</sup> See Simma, *ibid.*, p.235 “By sheer necessity, the quest to realize community interests has led to an ever stronger institutionalization, or organization, of international society”, (*ibid.* p.249) “there is reason to be concerned about new conceptions being grafted upon universal international law without support through, and serious attempts at, adequate institution building”, *ibid.* p.285 “The realization of community interests depends not only on the creation of norms positing an ‘international community’ but also on the existence of an institutional structure providing for the promotion as well as protection of these interests.”

<sup>35</sup> The example of the European Union will serve to show there is truth in this assertion. The level of acceptance of European law in member States and their legal systems would be unthinkable without the recognition of the doctrine of “direct effect”, which was a creation of the European Court of Justice. See also P. Allott, “The International Court and the Voice of Justice” in A.V. Lowe & M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge: Grotius, 1996) 17, p. 17 “a court makes a specific contribution to the general social task out of that society’s past, as it acts in society’s continuous present”.

<sup>36</sup> See D. Garland, *Punishment and Modern Society* (Oxford: Clarendon, 1990) Ch.11.

criminal law, and the effect that institutionalisation has had on the acceptance of that law.<sup>37</sup>

*Precept 4: Method: The Emergence of New Values Does Not Alter the Sources of International Law*

Although this thesis accepts that there are values in the international system, and there can be legitimate enquiries taking them into account, the epistemology of this thesis, in relation to rules, is positivist.<sup>38</sup> The sources of international law are still those listed in Article 38 of the ICJ Statute. These two positions need not be a contradiction in terms.<sup>39</sup> What would raise issues of coherence would be to draw normative conclusions from the values that appear to be emerging. Christian Tomuschat eloquently expresses the most appropriate position: “it would, of course amount to a deceitful trick to derive a whole series of specific legal consequences from a general concept such as the international community... However it would appear legitimate to have recourse to the idea of a collective interest of mankind, embodied in the international community and its constitution, when controversial legal issues have to be addressed”.<sup>40</sup> This avoids the

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<sup>37</sup> As will be seen, the acceptance of the values of international criminal law as part of community interest will build on Simma’s definition of community interest as “a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se*, but is recognized and sanctioned by international law as of concern to all States”, *supra* n.27, p.233.

<sup>38</sup> As Simma & Paulus, note, *supra* n.25, p.303, Positivism is “a label for a whole array of differing approaches.” The author would, thus, identify himself, with some hesitation, (labels can only ever provide a “broad-brush” description of a method) as what Simma and Paulus describe as the “modern positivist” approach. This approach accepts that the reality in which international law operates both can and is changing, the evidence of State practice is now broader than was accepted in the period of “classical positivism” and decisions of international tribunals, despite only being a subsidiary source, “their importance for the clarification of rules nowadays can hardly be overestimated” *ibid.* pp.306-307.

<sup>39</sup> In Simma’s words “The rise and recognition of community interests is one thing, their impact on the real world quite another” *ibid.*, p.247.

<sup>40</sup> Tomuschat, *supra* n.27, p.236. The approach is similar to that of Higgins, who states, in her *Problems and Processes* (Oxford: OUP, 1994) pp.5-7, “Where there is ambiguity or uncertainty, the policy-directed choice can properly be made... Even if policy concerns are entirely ignored, the law will fail in its ambition of neutrality for even such a refusal... is not without political and social consequences”.



crude antinomianism and wide ranging deduction from abstract value of McDougalism.<sup>41</sup> What this means in practice is that this thesis will attempt to avoid any such wide ranging deductions, and accepts that not only will the traditional State-based system survive,<sup>42</sup> but that this is not, of itself, a bad thing.<sup>43</sup> Any changes in the law have to occur by the traditional methods of law creation,<sup>44</sup> not drawn down from the ether or inferred solely from value changes. Pretending that there have been changes in the nature of law creation where there have not been has no more practical effect than claiming it is sunny when it rains. Simma & Paulus express the point thus: “only when linked to formal sources recognized as binding by the international community does law serve the decision maker in the search for a balance between idealism and realism, common values and ideological neutrality, apology and utopia.”<sup>45</sup>

## THE STRUCTURE OF THE THESIS

This thesis will investigate whether or not there is an incipient, integrated system of enforcement of international criminal law that is effective and credible, and also the

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<sup>41</sup> For criticisms of McDougalism see N. Duxbury, *Patterns of American Jurisprudence* (Oxford: OUP, 1995) pp.191-203; M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing, 1989) pp.170-178 and G. Fitzmaurice, “*Vae Victis* or Woe to the Negotiators, Your Treaty or Our Interpretation of it?” (1971) 65 *A.J.I.L.* 358. Although Higgins is often thought of as a McDougalite, her approach is far less open to these criticisms, on the ground that she limits invocation of value to areas of real ambiguity or uncertainty, without accepting the radical rule-scepticism of the traditional McDougalite approach. This position is actually similar to the modern positivist position adopted by Herbert Hart, see H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 2<sup>nd</sup> ed, 1994), p.135, “the open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of the circumstances, between competing interests which vary in weight from case to case.” Similar criticisms relating to deduction from value can be made of modern “Kantian” liberal theories of international law such as F.R. Teson, *A Philosophy of International Law* (Boulder: Westview, 1998).

<sup>42</sup> See S. Sur, “The State Between Fragmentation and Globalization” (1997) 8 *E.J.I.L.* 42; Simma, *supra* n.27, p.230.

<sup>43</sup> See B. Kingsbury, “Sovereignty and Inequality” (1998) 9 *E.J.I.L.* 599; P-M. Dupuy, “International Law: Torn Between Coexistence, Cooperation and Globalization: General Conclusions” (1998) 9 *E.J.I.L.* 278.

<sup>44</sup> See Jessup, *supra* n.23, p.17, “The inescapable fact is that the world today is organized on the basis of the coexistence of states, and that fundamental changes will take place only through state action, whether affirmative or negative”; Simma, *supra* n.27, p.246. As Simma says, *ibid.* p.348, “wishful thinking can spill over into legal argumentation with impunity only to a degree”, a sentiment similar to that expressed by Derek Bowett, reviewing F.R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (1988) 59 *B.Y.B.I.L.* 263, pp.263-264, “Professor Teson’s book is a brave attempt at wishful thinking. He assumes that if the philosophical basis for humanitarian intervention can be established, its legal validity follows. Unfortunately, State practice does not conform to this kind of logic, and the question remains: does the practice of States in the post-Charter era support such a right?”. As will be seen, many of the debates relating to humanitarian intervention also have analogies in debates in international crimes.

<sup>45</sup> *Supra* n.25, p.308.

extent to which the values inherent in international criminal law have been accepted by the international system. To do so, the thesis will proceed as follows.

First, the international criminal tribunals will be introduced, and their international status shown. This is to differentiate them from national courts, and because an understanding of their genesis is a necessary precondition to a full understanding of their operation and effects. Then, a discussion of their powers and jurisdiction will be entered into. It is not possible to understand the difference between the powers and functions of the international courts and the national court system without understanding the powers and jurisdiction that have been granted to international criminal tribunals. This is particularly relevant to the later discussion of the general legal regime for the prosecution of international crimes.

The main body of the thesis is taken up by an analysis of two of the obstacles to the achievement of an effective and credible system of enforcement. These are the nature of the international system and the bilateral model of criminal co-operation, and selectivity/non prosecution. This is not to suggest that there are no others,<sup>46</sup> but in the author's view, these are the most fundamental. The first is the most fundamental of all, as it could be that the traditional international system is structurally unable to come to terms with the existence of international crimes, and the problem, being of such a systemic nature, cannot be overcome. It may be that the traditional system has difficulties with international crimes, but, this thesis hopes to show that the problem is not insoluble, and institutionalisation may have helped, or, to some extent, the system has changed. The second problem, that of either selective enforcement, or no enforcement at all threatens to undermine the system. Universal crimes which are not enforced in a universal manner are a contradiction in terms. The point of a universal crime is that it is applicable to all

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<sup>46</sup> Other possible obstacles that could be discussed are the "limits of legalism" when dealing with large scale criminality, see for example G. J. Bass, "War Crimes and the Limits of Legalism" (1999) 97 *Mich. L.R.* 2103, pp.2106-2107. The author's response to this particular issue is that given the incommensurability of the harm, no response could be entirely adequate, but that as lawyers, we have to use the tools and concepts available to us to do what we can. See also Osiel, *supra* n.19, pp.144-147.



persons everywhere, when it is not enforced in a similar manner, the promise of a universal crime is not kept. Also, if international crimes are thought to protect foundational values, the sporadic enforcement of those crimes implies that those values are not so important after all, and the law is more rhetorical than real.

## THE STRUCTURE OF INTERNATIONAL CRIMINAL LAW ENFORCEMENT

This part of the thesis will discuss the practical manifestations of the tension between the nature of the decentralised, bilateral inter-State system and the evolving regime of international crime, which clashes with that regime, but has, in some areas, altered it. It will proceed to discuss certain aspects of the system, and how, if at all, the creation of the international criminal tribunals has overcome the problems that are identifiable in the “indirect” enforcement method. It will begin by focusing on State jurisdiction, and the immunities from that jurisdiction which have traditionally been accepted. It will then discuss the regime of extradition, which is both the cornerstone of the system and, in its bilateralist mode, a microcosm of the system, which brings to the fore many of the problems in the area. The possibility of a duty to extradite or prosecute offences, which could be a way around some of the difficulties, and have an important effect on the treatment of international crimes in peace settlements is also discussed. From there, the thesis will move on to note some of the inconsistencies in interpretation of international criminal law that have occurred, as a result of there being, until recently, few detailed definitions of international crimes, and even fewer authoritative judgments on them. The problems will show the advisability of some centralisation and increased co-operation. At all stages the aspects mentioned here will be put into context by reference to the problems as they have arisen in practice, and how, if at all, they have been overcome by the relevant international criminal tribunals.

## SELECTIVITY

This is a criticism that has a large degree of currency not only in the question of the invocation of humanitarian intervention,<sup>47</sup> but also in the application of international criminal law. This should not be a surprise, as both of them involve, albeit in different ways, enforcement of fundamental norms of international law; the difference is in the forcible or pacific nature of the mechanism. Selective application is not an argument alleging illegality,<sup>48</sup> but one that not only undercuts the universal nature of the crimes, but also the justifications of punishment. Deterrence is undermined by selective enforcement.<sup>49</sup> Retributivist justifications are based on the requirement that all persons performing prohibited acts require some form of punishment. When enforcement is selective, some of those people are left unpunished for reasons unrelated to the nature of their acts. This creates a dissonance with the requirements of deserts-based explanations of the idea of punishment. As far back as Aristotle discomfort with taking externalities into account can be seen.<sup>50</sup> Particularly in relation to criminal law, its claims to legitimacy must be undermined when the law is neither general, nor applied evenhandedly. As Martin Loughlin avers; “legal rules must be general. Generality in rule making reflects the aspiration that law should establish a common framework to which all must be bound. Generality thus expresses a belief that justice should be blind, or that the rules should not select particular individuals or groups for specific benefits or burdens”.<sup>51</sup> As Loughlin notes, this can be traced back to Blackstone, who believed that law should be

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<sup>47</sup> On which, see for example, D. Kritsiotis “Reappraising Policy Objections to Humanitarian Intervention” (1998) 19 *Mich J.I.L.* 1005, pp.1026-1034.

<sup>48</sup> “Unless the law can be seen to apply to George Bush (who ordered the invasion of Panama) as well as Saddam Hussein (who ordered the invasion of Kuwait)... it will seem hypocritical again” A.P. Rubin, “International Crime and Punishment” (Fall 1993) 34 *The National Interest* 73, p.74. Note that Rubin, no fan of the idea of international crimes does not term selective application illegal, but hypocritical.

<sup>49</sup> See David, *supra* n.32, p.351.

<sup>50</sup> See Aristotle, *Nicomachean Ethics* (Harmondsworth: Penguin 1976) p.181 “all the law considers... is the difference caused by the injury”.

<sup>51</sup> M. Loughlin, *Sword and Scales* (Oxford: Hart, 2000) p.79.



“permanent, uniform and universal”.<sup>52</sup> This is particularly relevant for the “core” crimes under consideration, crimes which are universally applicable throughout the globe. Selectivity undercuts the universal nature of the crimes, and gives rise to the suspicion that the values they protect in theory are considerably different to those they are used to vindicate in practice. Loughlin explains: “as an operative system of rules, legal judgment is quite distinct from political decision-making”.<sup>53</sup> Selective enforcement blurs the difference between the two, as it fails to focus on the acts alone, making actors relevant, and undercutting the universal applicability of the law.

Selectivity comes in two forms: jurisdiction, and incorporation/criminalisation. As Timothy McCormack puts it, “the history of war crimes reveals a dual selectivity on the part of the international community. This selectivity is first found in relation to the acts the international community is prepared to characterise as ‘war crimes’ and secondly, in relation to the particular alleged atrocities the international community is prepared to collectively prosecute”.<sup>54</sup> The extent to which this statement is borne out in relation to national and international criminal prosecutions is investigated in this part of the thesis, as are possible reasons for the selectivity, and the extent to which international tribunals have overcome the problems of selectivity *rationae materiae* and *rationae personae*.

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<sup>52</sup> *Ibid.* See W. Blackstone, *Commentaries on the Law of England* (Oxford: Clarendon, 1765) p.44. Lest charges be made that this is Anglocentric, it is worth bearing in mind that Blackstone was one of the writers most enamoured of the reality of international crimes, see M. Janis, “Jeremy Bentham and the Fashioning of International Law” (1984) 78 *A.J.I.L.* 405, p.407. The requirement of generality can also be seen in Hart’s *Concept of Law*, *supra* n.41, p.124 “In any large group general rules... must be the main standard of social control, and not particular directions given to each individual separately.”

<sup>53</sup> *Ibid.*

<sup>54</sup> T.L.H. McCormack, “Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law” (1997) 60 *Albany L.R.* 681, p.683.

From the above analysis, this thesis hopes to draw some tentative conclusions about the existence or otherwise of an integrated system for the enforcement of international criminal law.

# PART 1: INTRODUCING THE COURTS

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## INTRODUCTION

In spite of the rich history of international tribunals,<sup>1</sup> and perhaps as a result of the freedom of States to create, dissolve and structure international courts effectively as they please,<sup>2</sup> there has been little research into the criteria a court must fulfil to be considered international. As most international courts are concerned with State, not individual, responsibility,<sup>3</sup> what literature there is has not concentrated on the specific features of international criminal courts. In this chapter, an attempt will be made to evaluate the international or national nature of such courts, and apply this to the five courts this century that have traditionally been considered *international* criminal courts.<sup>4</sup> The purpose of this distinction between national and international courts is to emphasise that although we are moving towards an integrated scheme of prosecution of international crimes, the mechanisms are still distinct, and have unique features. Discussion of their nature will also assist understanding of some of the later parts of the thesis, where selectivity and the nature of the system of enforcement are at issue.

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<sup>1</sup> Hudson, as long ago as 1944, referred to “hundreds” of international tribunals (M.O. Hudson, *International Tribunals* (Washington: Carnegie Endowment for International Peace, 1944) p.17), see also R.P. Anand, *International Courts and Contemporary Conflicts* (New York: Asia Publishing, 1974) p.85.

<sup>2</sup> See Hudson, *ibid.*; Anand, *ibid.*

<sup>3</sup> See Anand *ibid.*, p.87, and H. Schermers & N. Blökker, *International Institutional Law* (The Hague: Martinus Nijhoff, 3<sup>rd</sup> ed., 1995) p.407.

<sup>4</sup> These are the Nuremberg and Tokyo International Military Tribunals (“Nuremberg IMT” and “Tokyo IMT” respectively), the International Criminal Tribunal for Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”) and the Court to be created by the Rome Statute for an International Criminal Court, (“ICC”).



## NATIONAL COURTS

There are far too many national courts to give more than a smattering of examples. The most well known of such courts in the West are probably the United Kingdom's House of Lords, the US Supreme Court, and the French *Cour d' Cassation*. Their common feature is that they are set up under the national constitutional structure of the state in which they operate. The legal basis of their constitution does not lie in the international sphere, although their jurisdictional competence may, as a matter of international law, be limited by it. They may, at times apply international law, either indirectly or directly.<sup>5</sup> Sometimes they may even apply international law as part of their primary functions, as is the case of prize courts,<sup>6</sup> but their competence to implement international law does not rest on an inter-state agreement, but the State's internal legislation or structure.<sup>7</sup> National criminal courts can be civilian or military, and their composition is not directly regulated by international law (although certain human rights standards may be pertinent).<sup>8</sup>

## INTERNATIONAL COURTS

There are many international courts, with diverse functions and structures. Examples of international courts include the International Court of Justice, European Court of Justice and the European Court of Human Rights. There are two common features which differentiate international courts from their national brethren. These are their basis, and the law they must apply. There are three other candidates that have been asserted as criteria for an international court. These are permanence, proceeding by way of rules of

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<sup>5</sup> See, for example the US Supreme Court in *ex parte Quirin* 317 US 161.

<sup>6</sup> See A.P. Rubin, *Ethics and Authority in International Law* (Cambridge: CUP, 1997) p.90, discussing *The Paquette Habana*, *The Lola* 175 US 677 (1900).

<sup>7</sup>This should not be confused with international agreements that certain matters should be subject to the adjudicative jurisdiction of certain states, (one contemporary example being the jurisdiction over torture conceded *inter partes* by the parties to the 1984 Convention on Torture (GA Resolution 39/46, UN Doc. A/39/51)). In these agreements the jurisdiction is conferred on the state, who is free to designate which of its courts is to assert such jurisdiction by national law.

procedure, and the binding nature of the decision.<sup>9</sup> The criterion of permanence is unnecessary, as it relates not to the classification of something as a judicial body or not, but to the legitimacy it has.<sup>10</sup> International law does not prohibit *ad hoc* courts.<sup>11</sup> In the international law of occupation, for example, an occupant is permitted to set up occupation courts to enforce any laws it promulgates.<sup>12</sup> These cannot continue in operation after an occupation, and thus, by necessity are temporary, yet by definition (in Article 66 of the Fourth Geneva Convention), they are “courts”. It is difficult to disagree with Schwarzenberger though, who stated that a permanent court is of greater international standing.<sup>13</sup> The other criteria, proceeding by rules of procedure and a legally binding outcome are irrelevant to the distinction between national and international courts.

## BASIS

This is the fundamental difference between a national and an international court. Whereas a national court is a creature of its local municipal order, an international court must have an international legal basis.<sup>14</sup> As restrictions on States in the creation of courts and institutions cannot be presumed, there are various ways that this may occur. Clearly

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<sup>8</sup> See, for example, the 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Article 14.

<sup>9</sup> See C. Romano, “The Proliferation of International Judicial Bodies: The Pieces of the Puzzle” (1999) 31 *N.Y.U.J.I.L. & Politics* 709, pp.711-718; J.G. Merrills, *International Dispute Settlement* (Cambridge: Grotius, 3<sup>rd</sup> ed. 1997) p.121 seems to adopt the requirements of permanence and legally binding outcome.

<sup>10</sup> Romano, *ibid.* p.718 accepts that although the ICTY and ICTR do not fulfil the test of permanence, they should be accepted as international judicial bodies.

<sup>11</sup> V. Morris & M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for Yugoslavia* (New York: Transnational, 1995) pp.38-9.

<sup>12</sup> 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287, Article 66.

<sup>13</sup> G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals Vol.1*. (London: Stevens, 3<sup>rd</sup> ed.1957) p.30. There are various reasons for this. Permanence gives a court the chance to develop its own jurisprudence, thus gain authority and prestige with uniform pronouncements of the law. Another reason is that there is a long-standing hostility to special criminal tribunals in many legal cultures. This is because they are seen as the tools of a vindictive executive rather than a vindication of the law they apply. Also *ad hoc* bodies are often seen as discriminatory, as they are a short-term response to an individual set of circumstances, passing over previous, unprosecuted violations of the law.

<sup>14</sup> This is without prejudice to any domestic implementing legislation required for the court to effectively function. The question at issue here is the basis upon which the court rests.



the “most authoritative”<sup>15</sup> way of creating a court is a treaty. With this there is clear evidence of state consent, and the treaty method is the normal mechanism for bringing an international body into being.<sup>16</sup> It is clear, though, that it is not the sole method of creating a judicial body. Courts may also be created by a decision of an organisation (or organ of one) that has the power to create a judicial body. This is clear from the decision of the ICJ in the *Effect of Awards Case*.<sup>17</sup> In this, the debate was centred solely on whether the General Assembly had, in fact, been empowered by the UN Charter to set up an international tribunal,<sup>18</sup> not whether it is possible to set up such a body by a resolution of a properly mandated body.<sup>19</sup> The matter is one of the extent to which States have ceded to the body in question the right to decide whether or not to create a court.

#### APPLICABLE LAW

As noted above, purely national courts do sometimes apply international law, so the power to apply international law is not necessarily determinative of status. What is clearer, however is that “[with regard to]...the question of applicable law...an international judicial body cannot render a judgment on the basis of domestic law, even though that law may recapitulate the rule of general international law”.<sup>20</sup> This is not only with regard to the applicable rules of substantive law, but also procedure.<sup>21</sup>

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<sup>15</sup> C.L. Blakesley, “Jurisdiction, Definition of Crimes and Triggering Mechanism” in M.C. Bassiouni (ed.) *The International Criminal Court: Observations and Issues Before the 1997-8 Preparatory Committee; and Administrative and financial Implications* (Chicago, Éres: AIDP, 1997) 177 at p.180.

<sup>16</sup> The International Court of Justice (ICJ), European Court of Justice, & European Court of Human Rights, for example are all treaty based entities.

<sup>17</sup> *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (1954) I.C.J.Rep. 47.

<sup>18</sup> That it is not a national court is clear from the decision of the ICJ itself (*ibid.* p.56) as they note Article 105 ensures immunity for UN staff from national jurisdictions.

<sup>19</sup> See *ibid.* pp.55-56.

<sup>20</sup> Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary General, UN Doc. S/25266, para 57. See also para 52 where the possibility of applying “national rules that are specific to a given State or States” is described as “unthinkable”.

<sup>21</sup> *Ibid.* para 52.

## NUREMBERG IMT

The first court to fall for discussion is chronologically the earliest (at least this century).<sup>22</sup> This is the Nuremberg IMT, created in 1946. During the war, the Allies issued many statements relating to violations of the law of war and promising punishment for such offences.<sup>23</sup> The most important of these was the Moscow declaration of 1 November 1943. In this “the... [US, UK and USSR]... speaking in the interests of the 32 United Nations... declar[ed]... at the time of the granting of any armistice to any government that may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of the liberated countries and of the free governments which will be erected therein... *the above declaration is without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint declaration of the*

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<sup>22</sup> In 1474, Peter von Hagenbach was tried before a tribunal that was arguably international or “at least functionally transnational”. (H. McCoubrey “The Concept and treatment of War Crimes” (1996) 1 *J.A.C.L.* 121 at p.123.) See generally G. Schwarzenberger “The Judgment of Nuremberg” (1947) 31 *Tul.L.R.* 329 at p.331; G. Schwarzenberger, *International Law As Applied by International Courts and Tribunals Vol II: The Law of Armed Conflict* (London, Stevens & Co, 1968) pp.462-466; T. McCormack “From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime” in T.L.H. McCormack & G.J. Simpson (eds.), *The Law of War Crimes: National and International Approaches* (The Hague: Kluwer, 1997) 31 at pp.37-39. It is excluded from further discussion because its status as a legal precedent for the present day is nugatory, it having occurred before 1648, thus when the structure of international law was fundamentally different. See D. Kennedy, “Primitive Legal Scholarship” (1986) 27 *Harvard I.L.J.* 1 at pp.1-5. This is not to denigrate its historical interest.

<sup>23</sup> See, for example the statements of Roosevelt and Churchill 25.10.1941, *Punishment for War Crimes, the Inter Allied Declaration Signed at St James's Palace in 13<sup>th</sup> January and Relative Documents* (London: HMSO, 1942) p. 15 Declaration of St James' Palace 13.1.1942, *Ibid.* p.1. 144 *B.F.S.P.* 1072; See generally the documents mentioned and quoted in UNWCC, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO, 1948) pp.87-94. In October 1943 the Allies also set up the UNWCC, on which see, UNWCC, *ibid.*; W. Bathurst, “The UN War Crimes Commission” (1943) 37 *A.J.I.L.* 565; A. Tusa & J. Tusa, *The Nuremberg Trial* (Macmillan: London, 1983) pp.22-23; T. Taylor, *The Anatomy of the Nuremberg Trials* (London: Little, Brown & Co., 1992) pp.26-28; A. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Durham: North Carolina U.P. 1998) pp.104-107. The last three of these were critical of the UNWCC, as they claim it did little practical work, being hobbled by a lack of State co-operation. On the attitude of the Allies at this time see Taylor, *ibid.*, pp.21-55, Tusa & Tusa, *ibid.*, pp.20-32, 50-67; Kochavi, *ibid.* *passim*; B.F. Smith, *Reaching Judgment at Nuremberg* (London, André Deutsch, 1977) Ch.2; H. Levie, *Terrorism in War: the Law of War Crimes*, (N.Y: Oceana, 1992) Ch.2.



*governments of the Allies*” [emphasis added].<sup>24</sup> This was not a legally binding commitment to punish the “major criminals” by judicial process, for two reasons. First, it is unlikely (albeit not impossible) that the Moscow Declaration could be considered a treaty between the Allied powers.<sup>25</sup> More importantly, by its own terms it did not apply to these “major criminals”, who would be punished by a “joint declaration of the Allies”. The Declaration was not seen by the Allies as ruling out an executive decision to punish them.<sup>26</sup> This did not prevent the Moscow declaration providing the political backdrop to the creation of the Nuremberg IMT, and was cited in its founding instrument.<sup>27</sup>

The real basis of the Nuremberg IMT is the London Agreement and Charter.<sup>28</sup> This agreement was negotiated by the US, UK, the USSR and France between June and August 1945.<sup>29</sup> This was a treaty, and thus it could be thought that this was determinative of the international basis. Things are not quite so simple. It could be thought that it was merely an agreement by the joint occupants to set up a joint tribunal under the authority of the Control Council, i.e. the body exercising sovereign authority over Germany. This would make the court akin to a national court, as it would be under the legal system of one sovereign authority (the Control Council), albeit one consisting of representatives of more than one State.

The first port of call to determine the status of the Nuremberg IMT must be the treaty and the annexed Charter. The Charter itself is slightly ambiguous on the nature of the Nuremberg IMT. Schwelb notes, “it contains such features as to make the court a

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<sup>24</sup> Declaration of Moscow 1.11.1943, 9 (US) *Dept. of State Bull.* 310 (No. 228, 6.11.1943). See UNWOC, *ibid* pp.107-8.

<sup>25</sup> As the law stood at the time (and now), for a treaty to be created the parties to it have to intend for it to be binding. See A.D. McNair, *The Law of Treaties* (Oxford: OUP, 1938) p.48. There is no conclusive evidence that the Allies saw the Moscow declaration in this way. On the Moscow declaration see L. Gross “The Prosecution of War Criminals: the Nuremberg Trial” in L. Gross, *Selected Essays on International Law and Organization* (N.Y: Transnational, 1984) 136 pp.136-140.

<sup>26</sup> See, e.g. Tusa & Tusa, *supra* n.23, p.24, 50-51; Taylor, *supra* n.23, Smith, *supra* n.23, pp.23-24. For Russian statements see G. Ginsburgs, “The Nuremberg trial: Background” in G. Ginsburgs & V. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff, 1990) 9 at p.28.

<sup>27</sup> 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Power and Charter of the International Military Tribunal, 82 UNTS 279. Preamble.

<sup>28</sup> *Ibid.* Charter of the International Military Tribunal, annex. [hereinafter “Nuremberg IMT Charter” or “London Charter”] Article 1, “In pursuance of the agreement signed on the 8<sup>th</sup> day of August... there shall be established an International Military Tribunal”.

<sup>29</sup> On the London Conference, see Taylor, *supra* n.23, Ch.4 and Smith, *supra* n.23, Ch.3.

judicial organ of the international community, and such as to make it appear a tribunal of considerably less standing, hierarchically subject to the Control Council for Germany and therefore being, in substance, an occupation court for Germany”.<sup>30</sup> In favour of its international status, the fact of its designation in the Charter as an “international” tribunal may be called in aid.<sup>31</sup> Secondly, Schwelb notes the Preamble of the London agreement, in which the four powers stated that they were acting “in the interests of all the United Nations”.<sup>32</sup> Care must be taken here though, as the Charter states that it was “in the interests of”, notably not “with the authority of” those States. Still, Article 5 of the Charter partially rectifies this problem, as it gave other “governments of the United Nations” the right to “adhere” to the instrument. Nineteen other States did this, thus adding their authority to it, and giving it a basis of State consent wider than the membership of the Control Council. Other provisions that could be mentioned are Articles 2 and 14. These gave the four powers, not the Control Council, the right to appoint their judges and prosecutors.<sup>33</sup>

Against these provisions can be placed certain other aspects of the Charter. The most important of these could be Article 1, which provides that the Tribunal was to be created “after consultation with the Control Council”. In reality this is ambiguous. It could easily refer to the Control Council in its capacity as local authority over Germany, in a similar way that the Netherlands is the local authority for the ICJ.<sup>34</sup> Schwelb opines that this cannot explain Article 22 of the Charter, which gave the Control Council the unilateral right to the location in the permanent seat of the Tribunal (Berlin) that the Tribunal was to meet.<sup>35</sup> This seems a very narrow basis upon which to imply subjugation to the Control Council. The Tribunal only formally sat in Berlin, and given the situation in Germany at the time, it was not entirely unreasonable that the Control Council was

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<sup>30</sup> E. Schwelb, “Crimes Against Humanity” (1946) 23 *B.Y.B.I.L.* 178 at p.208.

<sup>31</sup> *Ibid.*, referring to Article 1.

<sup>32</sup> *Ibid.*, referring to the Preamble.

<sup>33</sup> The US had originally intended the Control Council to appoint the judges, R.H. Jackson, *Report of Robert H Jackson, US Representative to the International Conference on Military Trials, to the President of the USA* (Washington D.C.: US Government Printing Office, 1945), pp26, 56. See also Gross, *supra* n.25, p.142.

<sup>34</sup> *Supra* n.30.

<sup>35</sup> *Ibid.*



empowered to determine its local seat. This power is a far cry from creating the Nuremberg IMT under the legal authority of the Control Council.

Schwelb also mentions Article 28 of the Charter.<sup>36</sup> This provides that if the Court confiscated goods it could order their delivery to the Council. This is a power for the court, not the Control Council, so the argument that this involves subordination is unconvincing. Similarly unconvincing is his argument on Article 30,<sup>37</sup> which made the Control Council pay the Tribunal's costs. This does not relate to its international status. States have to pay for the UN, but that does not render the UN a national institution. More convincing, is the proposition that Article 29 reduces its status. Article 29 demanded that the sentences the Tribunal imposed were to be served subject to the rules decided by the Control Council which also had the power to reduce or alter the sentences, save that they could not increase their severity.<sup>38</sup> On the other hand, third parties frequently carry out the enforcement of courts' judgments. Non-compliance with a judgment of the ICJ, for example, is to be reported to the Security Council, who can recommend action or take measures to enforce it.<sup>39</sup> This is not generally considered to subordinate the ICJ to the Security Council.

Still it could be thought that the Charter is ambiguous, so it is worthwhile checking the *travaux préparatoires*.<sup>40</sup> Prior to the drafting of the London Charter there were memoranda from the US and UK referring to the Nuremberg IMT as an "inter-Allied" body, which is not entirely helpful.<sup>41</sup> By the London conference, though, the negotiators were seemingly decided on its international nature. A US proposal for the Control

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Article 29 Charter, which is mitigated by Article 26, which states that the judgment itself is "final and not subject to review". This makes it clear that it is enforcement alone that is of interest to the Control Council.

<sup>39</sup> Article 94(2) UN Charter.

<sup>40</sup> This was acceptable at the time, McNair, *supra* n.25, pp.262-270. It remains so, see 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Article 32.

<sup>41</sup> See UK Memo 28<sup>th</sup> May 1945, US Memo 6<sup>th</sup> June 1945, although a US draft of April 1945 was already differentiating the "International" tribunal from occupation courts. See Gross *supra* n.25, p.140.

Council to set up the tribunal was rejected, the UK representative stated that it “would be a mistake to place it under the Control Council”.<sup>42</sup>

In the Trial itself, Francois de Menthon, the French Chief prosecutor, discussed the basis of the Tribunal. He argued that as the offences had no geographical location, any single State could not have tried the offences, but “only an international Tribunal, emanating from the combined United Nations” could do so, these states having transferred “their juridical power to an international court”.<sup>43</sup>

This argument was not repeated in the Nuremberg IMT Judgment. The Nuremberg IMT Judgment claimed: “[t]he making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered... The signatory powers created this tribunal... In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right to set up special courts to administer law”.<sup>44</sup>

It could be thought, particularly if emphasis is put on the first part of the Nuremberg IMT’s judgment, which implies that the Allies set up the Nuremberg IMT as legislators for Germany, that the Nuremberg IMT was thus a mere occupation court.<sup>45</sup> There are problems with this view. It is not entirely clear that the Allies had sovereignty over Germany. On 5 July 1945 the Allies issued the “Declaration concerning the defeat of Germany and the assumption of supreme authority with respect to Germany.”<sup>46</sup> The precise legal effect of this declaration is contested. Some, for example Kelsen, consider

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<sup>42</sup> Jackson, *supra* n.33, p.97. See generally, Gross, *ibid.* pp.140-142.

<sup>43</sup> 4 *The Trial of the Major German War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg* (London: HMSO, 1946) p.340. His argument seems to be that they pooled their jurisdiction over war crimes this way.

<sup>44</sup> Judgment of the International Military Tribunal, *ibid.* Reprinted in (1947) 41 *A.J.I.L.* 172 at p.216.

<sup>45</sup> See O. Kranzbühler, “Nuremberg as a Legal Problem” in W. Benton & G. Grimm, (eds.) *Nuremberg: German Views of the War Trials* 1955 (Southern Methodist UP: Dallas) 107 at p. 107. Schwarzenberger also takes the view that the basis of the Tribunal was the Allied co-imperium over Germany, *supra* n.22, p.467, 469.

<sup>46</sup> Declaration of Berlin, Cmd. 6648. As R.Y. Jennings points out, “Government in Commission” (1946) 23 *B.Y.B.I.L.* 112, p. 121, it studiously avoids the term “sovereign”.



that the Allies had assumed a supreme authority.<sup>47</sup> Others claim that the Allies had no international legal right to go beyond the rights of a belligerent occupier.<sup>48</sup> It is unnecessary to end the controversy here (although the supporters of the former view are far more numerous in the English speaking world) for two reasons. In the London Agreement, the Allies did not base themselves on their authority over Germany, if this was their basis, it might be thought it would be mentioned. In addition, the argument that the Nuremberg IMT was based on Allied sovereignty over Germany fails to take into account Article 6 of the Charter, which gave the tribunal the right to try offenders from any of the “European Axis” countries. If they based themselves purely on their power over Germany, then they could have only asserted themselves over Germans.<sup>49</sup>

This provision perhaps points towards the strongest base for the Tribunal, and one alluded to by de Menthon. This is that the Tribunal was based on a pooling of the jurisdiction of the four powers (and the adherents) over the offences over which it exercised jurisdiction.<sup>50</sup> The main problem with this argument lies in whether the Allies had the right to exercise (thus confer on the Tribunal) universal (or co-belligerent) jurisdiction over the offences in the Charter.<sup>51</sup> In relation to war crimes, this right was beyond doubt. For the other two offences, the position is dubious, as they were not generally recognised as being subject to universal jurisdiction at the time.<sup>52</sup> The Tribunal, however, was of the opinion that they were offences against international law which entitled the Allies to assert jurisdiction over them.<sup>53</sup> This, in addition to the assertion in

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<sup>47</sup> H. Kelsen, “The Legal Status of Germany According to the Declaration of Berlin” (1945) 39 *A.J.I.L.* 518; Q. Wright, “The Law of the Nuremberg Trial” (1947) 41 *A.J.I.L.* 38, p.51; Schwarzenberger, *supra* n.22, p.334; Jennings *ibid.*, pp.133-140; F. Mann, “The Present Legal Status of Germany” (1947) 33 *Transactions of the Grotius Society* 119. N. Ando, *Surrender, Occupation and Private Property in International Law* (Oxford: OUP, 1991) pp.74-6 claims that the Allies were entitled to subjugate Germany, thus had sovereignty.

<sup>48</sup> R.K. Woetzel, *The Nuremberg Trials in International Law* (London: Stevens, 1962) pp.78-81, he bases their rights on the dubious claim that the world community has mandated the Allies as “caretakers” of Germany *ibid.*, pp.87-8. H. Kraus, “The Nuremberg Trial of the Major German War Criminals: Reflections After Seventeen Years” (1963) 14 *De Paul L.R.* 233 at pp.242-3 and Gross, *supra* n.25, p.162 both note that in their opinion, there was no unconditional surrender, as only the armed forces surrendered.

<sup>49</sup> W.B Simons, “The Jurisdictional Bases of the International Military Tribunal at Nuremberg” in Ginsburgs & Kudrivatsev, *supra* n.26, 39 at pp.51-2.

<sup>50</sup> Simons, *ibid.*, p.45.

<sup>51</sup> These were war crimes, crimes against humanity and crimes against peace. Nuremberg IMT Charter, Article 6.

<sup>52</sup> See pp.217-220, 224-227.

<sup>53</sup> Nuremberg IMT Judgment, *supra* n.44, p.186.

the Nuremberg IMT Judgment that the Allies had jointly done what they could have done individually could represent the strongest basis for the tribunal.<sup>54</sup> The Nuremberg IMT's position differed from de Menthon's though, as the judges were of the opinion that any State could have tried the offences itself.

There has been another basis suggested, and some consider it to be "perhaps the single theory of jurisdiction that best fits the known facts, certainly as they are viewed in retrospect".<sup>55</sup> This theory is that the "authority to create the Charter and the Tribunal... was granted... [to the Allies]... by a majority of the world community",<sup>56</sup> thus creating a tribunal which exercised the jurisdiction of all of them to punish the defendants. This would consider the Allies creating the Tribunal, not as themselves, but as the representatives of the world.<sup>57</sup>

Simons implies this from certain statements of Soviet writers claiming that the Charter was binding on all states of the world.<sup>58</sup> These writings could also be read as relating to the customary content of the crimes contained in the Charter rather than an assertion that all States were bound by the provisions of the Charter. The writings also relate to a period after the judgment had been passed, and other actions relating to the Charter and judgment had been taken.<sup>59</sup>

Simons also bases his assertion on paragraph 5 of the Moscow declaration. There is nothing in the Moscow declaration to support his thesis.<sup>60</sup> He further claims that the repetition of "acting in the interests of" in the London Agreement, in conjunction with the invitation to United Nations states to adhere to the agreement, shows that the World

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<sup>54</sup> The Commission of Experts on Former Yugoslavia thought this was the basis of the Nuremberg Tribunal, Interim report of the Independent Commission of Experts on Former Yugoslavia Established Pursuant to Security Council Resolution 780, UN Doc. S/25274, para 73. This also seems to be the basis accepted by Lord Millett in *R v Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [No. 3], [1999] 3 W.L.R. 827, p.908. He is incorrect, however, to infer from the joint nature that it was merely a national court, as he ignores that they agreed to cede their jurisdiction to the Nuremberg IMT (not the Control Council) by treaty.

<sup>55</sup> Simons, *supra* n.49, p.52.

<sup>56</sup> G. Ginsburgs, *The Soviet Union, the Nuremberg Trial and International Law* (unpublished study) p.283, cited in Simons, *ibid.* p.53.

<sup>57</sup> See Simons, *ibid.* p.52.

<sup>58</sup> *Ibid.*

<sup>59</sup> Most importantly General Assembly Resolution 95(I), UN Doc. A/64/Add. 1.



mandated the Allies.<sup>61</sup> On the contrary, as mentioned above, the agreement did not say the four powers acted with these States' authority. If the four had authority from the others, Article 5 would be otiose. Woetzel offers a slightly different justification for the implication of a mandate from the world community.<sup>62</sup> Although he counsels caution, claiming strong evidence must be found before authority from the world can be implied,<sup>63</sup> he claims that the Nuremberg IMT was authorised by the world community as the "quasi-totality of civilised states" were represented on the UNWCC. Two points must be made about this. The UNWCC had sixteen members, with many large States (including the USSR) not participating. Secondly, the UNWCC was not involved in the creation of the Nuremberg IMT.<sup>64</sup>

In reality, as Reid points out "the sponsors were not the world community, but a fragile coalition whose interests only temporarily coincided".<sup>65</sup> Woetzel's claim of support by the "quasi-totality of civilised States" is over-enthusiastic, but this does not remove the treaty basis between the four members and nineteen adherents, who agreed to pool jurisdiction in an international tribunal. Thus its basis was international in this way.

## TOKYO IMT

Whereas the Allies spoke of punishment for the atrocities committed in the European sphere from fairly early on in the Second World War, those fighting in the Pacific sphere did not expressly mention individual liability until late in the war.<sup>66</sup> In 1942

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<sup>60</sup> The relevant parts of which are cited above, *supra* n.32 and accompanying text, where it is noted that acting "in the interests of" is not the same as "with the authority of".

<sup>61</sup> United Nations States does not refer to State members of the international organisation the United Nations, but those fighting on the Allied side in WWII.

<sup>62</sup> *Supra* n.49, p.52.

<sup>63</sup> *Ibid.*

<sup>64</sup> For a discussion of the UNWCC's non-involvement, see M.C Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: the Need to Establish a Permanent International Criminal Court" (1997) 10 *Harvard H.R.J.* 11 p.22; also Taylor, *supra* n.23, p.28.

<sup>65</sup> K. Reid, *War Crimes Trials and Cultural Mythology* (unpublished honours thesis, University of Melbourne, 1992)(on file with author) p.58. See also *Prosecutor v Tadic*, Opinion and Judgment, 1 May 1997, IT-94-1-T, para 1, noting that the Nuremberg IMT was "multinational in nature, representing only part of the world community".

<sup>66</sup> Protests relating to violations of the laws of war were issued though. R.J. Pritchard & S.M. Zaide, (eds.), *The Tokyo War Crimes Trial* (New York: Garland, 1981) Vol 20. *Judgment*, pp.48,648, 48,669, 48,683.



China was the only party who claimed the St James' Palace Declaration referred to above applied to the Pacific sphere.<sup>67</sup> Later that year there were some statements relating to prosecution of international crimes from the US,<sup>68</sup> but the first important multilateral declaration came in 1943. This was the Cairo Declaration of 1 December 1943, in which the UK, US and China promised to “restrain and punish the aggression of Japan” and to eject Japan from the territories it had conquered.<sup>69</sup> Although some later US declarations were contradictory on whether or not individual liability would be imposed,<sup>70</sup> in May 1944 the UNWCC set up a Far East division.<sup>71</sup> By far the most important of the declarations of the war, however, was the Potsdam Declaration of 25 July 1945.<sup>72</sup> In this, the US, UK and China set out their terms of surrender for Japan.<sup>73</sup> The most important part of this declaration was Principle 10 which read “we do not intend the Japanese to be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners”. This does not clearly mandate an international judicial process, but given the timing, and its reference to “stern justice”, some form of trial seemed likely.<sup>74</sup> On 11 August, the UK, US, China and the USSR clarified what General MacArthur's powers, as Supreme Commander for the Allied Powers (SCAP) would be, by defining them to include the power to “take such steps as he deems proper to effectuate the surrender terms”.<sup>75</sup>

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<sup>67</sup> S. Horwitz, “The Tokyo Trial” (November 1950) *International Conciliation* 465, p.478. J. Keenan and B.F. Brown, *Crimes Against International Law* (Washington D.C.: Public Affairs Press, 1950) p.25 suggest this was because the USSR was not at war with Japan at the time.

<sup>68</sup> See Roosevelt's comments, and Vice President Wallace's address “America's part in World Reconstruction”, both quoted (without citation) in J. Piccigallo, *The Japanese on Trial* (Austin, Texas: Texas U.P., 1979) p.4.

<sup>69</sup> E. Kopelman, “Ideology and International Law: the Dissent of the Indian Justice at the Tokyo War Crimes Trial” (1991) 23 *N.Y.J.I.L. & Politics* 373 at p.386 notes that this is not phrased in terms of individual liability.

<sup>70</sup> Horwitz, *supra* n.67, p.477.

<sup>71</sup> See Bathurst, *supra* n.23, p.570. In view of the criticisms of the UNWCC (see above, *supra* n. 23) this could be seen as a case of too little, too late.

<sup>72</sup> 13 US Dept. of State Bulletin (29 July 1945), p.137. Annex A-1 Vol. 7 p.1. By this time the Allies in Europe had already agreed (in principle) to an international tribunal for the major war criminals in Europe.

<sup>73</sup> The USSR adhered to the declaration later, upon its entry into the Pacific war (9 August 1945).

<sup>74</sup> That earlier statements were equivocal was shown by the fact of many people being surprised by this part of the declaration, See B.V.A. Röling & A. Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Cambridge: Polity Press, 1993) p.2.

<sup>75</sup> 13 US State Dept. Bulletin (12 August 1945) p.206.

On 14 August 1945, the Japanese government accepted the Potsdam declaration, and the instrument of surrender was signed on 2 September 1945.<sup>76</sup> After the surrender General MacArthur made various statements to the effect that those charged with atrocities or war crimes were to be handed over to the Allies or punished. On 21 September there was a directive from the US Joint Chiefs of Staff, and approved by all of the nations taking part in the occupation of Japan. The directive ordered the investigation and arrest of all persons suspected of war crimes. General MacArthur was mandated to set up international courts for their trial. At this point, although the directives were “known and approved” by the other nations, they constituted unilateral action by the US.<sup>77</sup>

In October, the Allies set up the Far Eastern Advisory Commission to recommend policies for the implementation of the Terms of Surrender.<sup>78</sup> The USSR refused to join, due to the Commission’s non-mandatory powers,<sup>79</sup> so in December, the US, UK and Soviet Union agreed to create the “Far Eastern Commission” (FEC) by declaration on 27 December.<sup>80</sup> This set up a body of eleven States, with the four major Allies having a veto power. It issued directives for the occupation to the Allied Council for Japan. The declaration also officially delegated the power to General MacArthur to implement their directives and the terms of surrender.<sup>81</sup> The nature of this was that the Allies granted the power to General MacArthur to act on behalf of all of them, (and for Japan, in accordance with its consent), to implement the surrender terms and any further directives they gave him. The instrument of surrender amounted to a treaty between the Japanese authorities and the Allies. The Allies then delegated the powers that they had in international law to punish war crimes and those conceded to it by Japan, to General MacArthur, subject to their right to issue directives to him.

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<sup>76</sup> 13 US Dept. of State Bulletin (9 September 1945) p.364 Annex A-2, pp.7-11. It was signed by Japan and General MacArthur, on behalf of the US, UK USSR, China and the other United Nations at war with Japan.

<sup>77</sup> See, UNWCC *supra* n.23, p.383; S. Horwitz, *supra* n.67, p.480.

<sup>78</sup> *Activities of the Far Eastern Commission Report by the Secretary General* US Dept. of State Publication 2888, (1947) 24 Far Eastern Series.

<sup>79</sup> Horwitz, *supra* n.67, p.481.

<sup>80</sup> 13 US Dept. of State Bulletin no 340 (1945) pp.1027-1032. China concurred in the communiqué.

<sup>81</sup> *Ibid.* Article VII B.5.



It was by virtue of the powers granted to him under the Moscow agreement (thus on behalf of the FEC)<sup>82</sup> that, on 19 January, General MacArthur, as SCAP, ordered the creation of the Tokyo IMT “in order to implement the term of surrender which required the meting out of stern justice to war criminals”.<sup>83</sup> There are three possible bases for his authority under the Moscow agreement. Either the Allies transferred their powers under the instrument of surrender to him, they transferred rights they already had to enforce international criminal law, or they transferred their powers under Article 43 of the Hague Rules to him.<sup>84</sup> It is interesting to note that at no point did General MacArthur or the Allies rely on occupation law. Reliance on occupation law for the authority to set up the Tokyo IMT would not necessarily mean that the tribunal was non-international as, in contrast to the position in Germany, the Allies did not claim to be the sovereigns of Japan. If occupation law was used as the basis of the Tokyo IMT, it would not bring it under the acts of one sovereign as the Allies (and Japan) agreed that they were entitled to prosecute international crimes and delegated the authority to General MacArthur.<sup>85</sup>

The Charter of the Tokyo IMT is not particularly helpful here. It is possible to argue that as Article 5 gave the Tokyo IMT the right to prosecute the “Far Eastern War Criminals” it was an exercise of universal jurisdiction by the Allies. Of course this argument is weakened by the fact that there were no other States fighting alongside Japan in the Far East. In contradistinction to the provision at Nuremberg, the individual States did not appoint the members, they submitted one candidate each, to General MacArthur, who formally appointed them.<sup>86</sup> What is clear though (albeit not from the Charter itself),

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<sup>82</sup> It is clear that MacArthur was exercising powers delegated to him (and not to the USA), and he was acting as an agent of the Allied nations. See *Hirota v MacArthur* 335 US 876; 93 L. Ed. 1903 at p.1904.

<sup>83</sup> Special proclamation, Establishment of an International Military Tribunal for the Far East, 19 January 1946, T.I.A.S. No 1589 at p.3. The proclamation cited the Potsdam declaration, the instrument of surrender, and the Moscow agreement. See Schwarzenberger *supra* n.22, p.467.

<sup>84</sup> Rules Annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, UKTS 9 (1910), Cd 5030, Article 43.

<sup>85</sup> For a differentiation of the situations of Germany and Japan at the end of the war and a convincing rebuttal of the argument that the Allies had unlimited powers in Japan see Ando, *supra* n.47, pp.65-102.

<sup>86</sup> Tokyo IMT Charter, Article 2.



is that the primary author of the Charter, Joseph Keenan, considered the basis to be the joint exercise of universal jurisdiction.<sup>87</sup>

As the Tokyo IMT's decision refers to the basis of General MacArthur's authority to set it up, it is worthwhile examining both the majority and individual opinions. The majority opinion is helpful in narrowing the options to those addressed above, but not so helpful in distinguishing which of the bases MacArthur was actually relying on:

"The tribunal was established in virtue of and to implement the Cairo declaration of the 1<sup>st</sup> of December 1943, the Declaration of Potsdam of the 25<sup>th</sup> of July 1945, the instrument of surrender of the 2<sup>nd</sup> of December 1945, and the Moscow conference of the 26<sup>th</sup> of December 1945".<sup>88</sup>

A little later in the judgment, certain things may be implied from the majority's rejection of the view that "the Allied powers or any victor nations have the right under international law in providing for the trial and punishment of war criminals to enact or promulgate laws or vest in their tribunals powers in conflict with recognised international law or rules or principles thereof."<sup>89</sup> They continued: "[i]n the exercise of their right to create tribunals for such a purpose and in conferring powers upon such tribunals belligerent powers may only act within the limits of international law".<sup>90</sup>

Here we can see that their focus was on the rights of belligerent powers both in terms of the Allies, but also *in abstracto*, they did not mention Japan's consent in the surrender terms. On the other hand, when dealing with the argument that the Japanese government did not consent to jurisdiction of the Tokyo IMT over crimes against peace the Tokyo IMT gave two reasons why this was not the case. Firstly, the majority noted that (in its opinion) aggression was an international crime before the Potsdam declaration. Thus, in consenting to it Japan could be taken to have consented to jurisdiction over these

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<sup>87</sup> See Keenan & Brown *supra* n.67, p.18.

<sup>88</sup> The Tokyo IMT Judgment, *supra* n.66, p.48,415.

<sup>89</sup> *Ibid.* p.48,836.

<sup>90</sup> *Ibid.*

crimes.<sup>91</sup> The second reason the majority in the Tokyo IMT gave was that Japan, in the circumstances, clearly did know that prosecution for crimes against peace would be undertaken.<sup>92</sup> Both of these arguments presume that the basis for jurisdiction was consent of Japan to the punishment of international crimes, not the power of the Allies to assert such jurisdiction *proprio motu*.

President Webb seemed to think that he differed to the majority on the basis of the Tribunal. Although he thought the basis was Potsdam and the instrument of surrender, he considered the majority to have relied on the exercise of the pre-existing right of belligerent States to prosecute war crimes.<sup>93</sup> For the actual authority to set up the Tribunal in Japan, Webb referred to occupation law.<sup>94</sup>

In his dissenting opinion, Judge Bernard disagreed with the majority about the basis for the Tokyo IMT.<sup>95</sup> He thought the basis was the right of States to enforce international criminal law. He wrote “he who possessed of actual power and moral authority sufficient to assume that duty [enforcing international law] can set up the necessary tribunals for the trial of persons suspected of acts supposed to be in criminal infringement of natural and international law.”<sup>96</sup> He considered the Allies to have devolved this power onto General MacArthur who set up the Tribunal “in their name.”<sup>97</sup>

Judge Jaranilla relied on both theories of General MacArthur’s powers. He began by basing himself of the agreement of Japan to the prosecution of war criminals in the instrument of surrender,<sup>98</sup> but then went on to note that even without such agreement, belligerent nations had the power to prosecute war crimes. He later claimed that the Tokyo IMT was “created pursuant to an agreement among the Allied powers and to Japan’s acceptance” but that “what one nation can, in accordance with international law,

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<sup>91</sup> *Ibid.* p.48,440.

<sup>92</sup> *Ibid.* p.48,440-48,441.

<sup>93</sup> Separate Opinion of the President, *supra* n.66, Vol 21. *Separate Opinions* p.1. He referred to the Charter as “international law” (*ibid.*).

<sup>94</sup> *Ibid.* pp.1-2.

<sup>95</sup> Dissenting Opinion of the Member from France, *ibid.* p.1.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.* p.3.

do in said cases, a number of nations can, acting under a common agreement likewise do... .victorious states have the right to try war criminals pending the signing of a peace treaty.”<sup>99</sup> He may be taken to have seen the creation of the Tokyo IMT as the joint exercise of belligerent rights, given additional authority by the Japanese consent.

Judge Pal had little to say on this matter (although it is possible that he considered the basis of the Tokyo IMT to be belligerent rights to prosecute international crimes, given his views on the Tokyo IMT’s Charter (see *infra* p.53)), but Judge Röling’s judgment was helpful as he summarised what he thought the majority’s basis for the Tokyo IMT was. He claimed that the basis was “that the victorious nations, in providing for the trial and punishment of war criminals, have the right to promulgate a Charter and to create a Tribunal.”<sup>100</sup> His personal view was that the basis of the Tokyo IMT was the acceptance of the Potsdam declaration by the Japanese.<sup>101</sup>

From the above it is difficult to definitively state the basis upon which the Allies were granted their powers, whether the consent of Japan or their right to assert belligerent jurisdiction over international crimes.<sup>102</sup> In the end, it is ultimately unnecessary to determine the basis of the Allied power to try the Japanese war criminals, as it is clear that the basis was international law. This was either customary international law allowing jurisdiction over international crimes<sup>103</sup> or the surrender terms being signed by the various States, and the delegation of these powers to General MacArthur. Although he was a US citizen, and also acting under orders of the US government, in creating the

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<sup>98</sup> Concurring Opinion of Mr. Justice Jaranilla, Member From the Republic of the Philippines, *ibid* p.13.

<sup>99</sup> *Ibid* pp.13-14.

<sup>100</sup> Partially Dissenting opinion of the Member from the Netherlands, *ibid* p.14.

<sup>101</sup> *Ibid* pp.6-7.

<sup>102</sup> Gross, *supra* n.25, p.161, and Schwarzenberger, *supra* n.22, p.468 consider it the former, Keenan and Brown, *supra* n.67, p.18 the latter.

<sup>103</sup> Or, to be more accurate, their view of which international crimes existed at the time, which did not necessarily correlate with other views on the matter.



Tokyo IMT he was not acting under powers granted to him under the constitutional law of any one State.<sup>104</sup>

The last ground that had been asserted was that “international society” (such that there was) had mandated the Allies to set up the Tokyo IMT, and this was evidenced by the surrender terms.<sup>105</sup> This argument cannot stand, there is nothing in the surrender terms to warrant such a conclusion, and the Allies had not been mandated by any nations other than themselves to act on the surrender. As Woetzel states,<sup>106</sup> a mandate from “international society” cannot easily be implied, and states cannot merely presume it. A resolution of an international organisation such as the UN may suffice. However, there was no such resolution before or after the Tokyo IMT, so this cannot be used to justify the Tokyo IMT. Some say that due to the proportion of mankind notionally represented at the Tokyo IMT (over half the world’s population), a mandate from international society can be implied.<sup>107</sup> This form of crude head counting is not a clear basis from which to work, not least as the representation at Tokyo was that of the victors in a war, and no other nations. This does not remove the fact that the basis of the Tribunal was agreement between various States to act jointly, thus rendering the basis formally international.

## THE INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA (ICTY)

Despite numerous wars and atrocities occurring in the forty five years following the Nuremberg and Tokyo IMTs, there were no international criminal tribunals created. It

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<sup>104</sup> See *Hirota v MacArthur* *supra* n.82, p.1904. Occupation documents of the US authorities tend to show that the court was considered an international one, not a US court. See Keenan & Brown *supra* n.67 p.9, citing: *Occupation of Japan, Policy and Progress* US Dept of state publication 267 Far Eastern Series, 17 Appendix 32, 147 at p148; Prosecution exhibit 9 General Orders No 20, GHQ, SCAP, Charter of the IMTFE, Tokyo transcript May 6 1946, 106 Document 6503.

<sup>105</sup> Keenan & Brown *ibid.*, pp.2, 40.

<sup>106</sup> *Supra* n.48, p52.

<sup>107</sup> See Piccigallo *supra* n.68, p.212.

took the atrocities of the Yugoslav wars of dissolution<sup>108</sup> to elicit an international penal response. The history behind the creation of the ICTY reveals certain similarities and differences to that preceding the Nuremberg and Tokyo IMTs. One similarity to the two IMTs created in the aftermath of WWII, was that the history of the ICTY begins with public denunciations of the atrocities.<sup>109</sup> The first relevant resolution was Security Council Resolution 764,<sup>110</sup> which demanded compliance with humanitarian law in former Yugoslavia. When this had no practical effect, the Security Council passed Resolution 771.<sup>111</sup> This demanded, under Chapter VII of the UN Charter, that the parties to the conflict cease their breaches of humanitarian law, and gave a list of such violations. It also contained a request to States to submit any “substantiated information” on these violations which was in their possession to the Security Council.<sup>112</sup>

The next step mirrored the events in WWII. In the face of the continued violations of humanitarian law in former Yugoslavia, the Security Council promulgated Resolution 780.<sup>113</sup> This created a Commission of Experts to investigate and gather evidence of the violations of humanitarian law in former Yugoslavia.<sup>114</sup> Like the UNWCC, the Commission was hamstrung by State ambivalence and lack of finance.<sup>115</sup> A difference between the reaction to the atrocities in Yugoslavia and the analogous steps in WWII,

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<sup>108</sup> On which see generally, L. Silber & A. Little, *The Death of Yugoslavia* (Harmondsworth: Penguin & BBC Books, 1996); J. Gow, *The Triumph of the Lack of Will: International Diplomacy and the Yugoslav War* (New York: Columbia U.P. 1997). For an early discussion of the application of international law to the conflict, see J.J. Paust, “Applicability of International Criminal Law to Events in Former Yugoslavia” (1994) 9 *A.U.J.I.L. & Policy* 499.

<sup>109</sup> On the following resolutions and the events leading up to the creation of the ICTY see J. O’Brien “The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia” (1993) 77 *A.J.I.L.* 639, pp.639-642; Morris & Scharf, *supra* n.11, Ch.2; M.C Bassiouni & P. Manikas, *the Law of the International Criminal Tribunal for Yugoslavia* (N.Y: Transnational, 1996) Ch.2; M.P. Scharf, *Balkan Justice: The Story Behind the First International Trial Since Nuremberg* (Durham: North Carolina U.P., 1997) Ch.4; On the response of other organisations or UN bodies see P. Akhavan, “Prosecuting War Crimes in the former Yugoslavia: A Critical Juncture for the New World Order” (1993) 15 *H.R.Q.* 262.

<sup>110</sup> UN Doc. S/RES/764.

<sup>111</sup> UN Doc. S/RES/771.

<sup>112</sup> As Morris & Scharf note, *supra* n.11, p.23 the lack of definition of “substantiated information” led to conflicting State interpretations of the type of information requested.

<sup>113</sup> UN Doc. S/RES/780.

<sup>114</sup> On the Commission see Bassiouni, *supra* n.64, pp.39-42; M.C Bassiouni “The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780” (1994) 88 *A.J.I.L.* 784; W.J. Fenrick “In the Field With UNCOE: Investigating Atrocities in the Territory of Former Yugoslavia” (1994) 34 *R. Dr. Mil et Dr. de la Guerre* 33; Scharf, *supra* n.109 Ch.3.

<sup>115</sup> See Bassiouni, *supra* n.64, p.39 (“there is an uncanny resemblance between the problems facing the Commission of Experts and those of the UNWCC”) and p. 41.



was that the pronouncements were not made by one party to the conflict, but by the (near universal) international organisation, the United Nations.

Between the submission of the Commission of Experts' interim and final reports, the Security Council took the decision to take steps to bring into being an international criminal tribunal. This decision came in the form of Resolution 808,<sup>116</sup> in which the Council decided that "an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991". To begin the process, the resolution asked the Secretary General to prepare a report within sixty days on how to establish an international criminal tribunal. When the Secretary General reported back, he included a draft statute for the tribunal. This was adopted unanimously by the Security Council in Resolution 827, which created the ICTY.<sup>117</sup>

It remains to determine the precise legal basis for the ICTY. In the Secretary General's report (which serves as a form of *travaux préparatoires* for the ICTY Statute) the possibility of using a treaty to set up the ICTY was canvassed, as this would be "the approach which, in the normal course of events, would be followed in establishing an international tribunal".<sup>118</sup> In the circumstances, the Secretary General thought this would take too long, and, tellingly, there was "no guarantee that ratifications...[would be]...received from those States which should be parties to the treaty".<sup>119</sup> As a result and "in the light of the disadvantages of the treaty approach...the Secretary General believe[d] that the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations. Such

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<sup>116</sup> UN Doc. S/RES/808.

<sup>117</sup> UN Doc. S/RES/827.

<sup>118</sup> Report of the Secretary General Pursuant to Security Council Resolution 808 UN Doc. S/25704 para 19. The CSCE had previously suggested a treaty for the creation of the ICTY, and had drafted one. See UN Doc. S/25307.

<sup>119</sup> *Ibid.* para 20.



a decision would constitute a measure to maintain or restore international peace and security”.<sup>120</sup>

This was the approach taken by the Security Council, which established the ICTY by Resolution 827. The resolution determined that the continued violations of humanitarian law by the parties involved in former Yugoslavia constituted a threat to international peace and security, and thus was based on an exercise of power under Chapter VII of the UN Charter. There has been criticism of this decision to categorise the atrocities as a threat to the peace. Alfred Rubin, for example claims that by its decision, the Security Council was acting against international law by trying to make revolution illegal.<sup>121</sup> This is incorrect, as the Security Council’s decision that there was a threat to the peace was not based on the idea that the threat to peace was based on the civil war *per se*. As mentioned above, it was based on the atrocities occurring. It also presumes that the characterisation of something as a threat to international peace and security is a determination that a violation of the law has occurred. This is not the case.<sup>122</sup> It is generally accepted that the Security Council acted legally in this respect,<sup>123</sup> a position in which the author concurs, not least as there is practice that supports such an interpretation, and the Security Council

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<sup>120</sup> *Ibid.* para 22. A. Roberts “The Laws of War: Problems of Implementation in Contemporary Conflicts” (1995) 6 *Duke J.I. & C.L.* 11 at p.64 commends the Secretary General’s realistic approach, which effectively circumvents the requirement for State consent.

<sup>121</sup> A.P. Rubin, “Dayton, Bosnia and the Limits of Law” (Winter 1996/7) 47 *The National Interest* 41 at p.41.

<sup>122</sup> See generally N.D. White, *Keeping the Peace* (Manchester: MUP, 2<sup>nd</sup> ed. 1997), pp.42-47.

<sup>123</sup> See Morris & Scharf, *supra* n. p.43-44; O’Brien, *supra* n.109, p.640; T. Meron, “War Crimes in Yugoslavia and the Development of International Law” (1994) 88 *A.J.I.L.* 78, p.79; C. Greenwood, “The International Tribunal for Yugoslavia” (1993) 69 *I. Aff.* 641, p.646; F. Patel-King, “Sensible Scrutiny: The Yugoslavia Tribunal’s Development of Limits on the Security Council’s Powers under Chapter VII of the Charter” (1996) *Emory I.L.R.* 509, pp.547-557, Bassiouni & Manikas, *supra* n.109, pp.237-252; C. Tomuschat, “International Criminal Prosecution: The Precedent of Nuremberg Confirmed” in R. Clark & M. Sann, *The Prosecution of International Crimes* (New Brunswick: Transaction, 1995) 17, p.21; R. Klodokin, “An ad hoc Tribunal for the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia” in Clark & Sann, *ibid.* 165, pp.175-9; C. Warbrick & P. Rowe “The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the *Tadic* Case” (1996) 45 *I.C.L.Q.* 691; D. Sarooshi, “The Legal Framework Governing United Nations Subsidiary Organs” (1996) 67 *B.Y.B.I.L.* 413, pp.428-431; C. Blakesley, “Atrocity and its Prosecution: The Ad Hoc Tribunals for the former Yugoslavia and Rwanda” in McCormack & Simpson, *supra* n.22, 189, pp.198-99; Ratner & Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Paradigm* (Oxford: OUP, 1997) p.167, albeit noting some discomfort in developing States. The legality is challenged by A.P Rubin, *supra* n.121 & “An International Tribunal for former Yugoslavia”(1994) 6 *Pace I.L.R.* 7 at pp.7-8 and (on similar grounds) by T.D. Mak, “The Case Against an International War Crimes Tribunal for the Former Yugoslavia” (1995) 2 *International Peacekeeping* 536. See also D. Cotic, “Introduction” in Clark & Sann, *ibid.*, 3, p.13; T. Sapru, “ Into the Heart of Darkness: The Case Against the Foray of the Security Council into Rwanda”(1997) 32 *Texas I.L.J* 329.

is granted a wide discretion in the interpretation of the phrase.<sup>124</sup> The legality of the determination has been upheld by the ICTY in the *Tadic* case,<sup>125</sup> and since the *Tadic* determination, the matter can be considered settled.

The actual provisions within Chapter VII on which the power to set up the ICTY are based are not mentioned in Resolution 827. The issue of where in Chapter VII the power was based was settled by the *Tadic* decision. Here the Appeals Chamber expressly rejected the idea that it was a forcible measure under Article 42, or a preliminary measure under Article 40.<sup>126</sup> The Appeals Chamber placed the basis squarely on Article 41 of the Charter.<sup>127</sup> The legality of the creation of the Tribunal has caused some controversy, and was challenged by the defendant in the *Tadic* case. The first ground of challenge was that the Security Council was not mandated by the framers of the Charter to create such a body.<sup>128</sup> It may be true that the framers did not specifically consider the issue of whether the Security Council could do such a thing. That is not the point. In a constitutional document such as the UN Charter, the intention of the original drafters is less important than subsequent interpretation of the powers granted.<sup>129</sup> As Schachter comments “the Charter is surely not to be construed like lease of land or an insurance policy, it is a constitutional instrument whose broad phrases were designed to meet changing circumstances for an undefined future”.<sup>130</sup>

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<sup>124</sup> See Patel-King *ibid.*, White *supra* n.122.

<sup>125</sup> *Prosecutor v Tadic*, Decision on the Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72, paras 32-36. See Patel-King, *ibid.* G. Aldrich “The Jurisdiction of the International Criminal Tribunal for Yugoslavia” (1996) 90 *A.J.I.L.* 64; J. Alvarez, “Nuremberg Revisited: The Tadic Case” (1996) 7 *E.J.I.L.* 245; C. Greenwood “The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia” (1998) 2 *Max Planck Y.B. U.N.L.* 97, p.103; Warbrick & Rowe, *supra* n.123; G.R. Watson “The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in *Prosecutor v Tadic*” (1996) 36 *V.J.I.L.* 687.

<sup>126</sup> *Tadic*, *supra* n.125 para 33.

<sup>127</sup> *Ibid.* para 34 “Prima facie, the International Tribunal matches perfectly the description in Article 41 of ‘measures not involving the use of force’.” Para 36. “the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.”

<sup>128</sup> *Tadic*, *ibid.* para 32. See also the comments of Brazil at UN SCOR 47<sup>th</sup> Sess. S/PV. 3175 p.4, and China at S/PV. 3217 p.20-21.

<sup>129</sup> See B. Urquhart, “The United Nations and International Security After the Cold War” in A. Roberts & B. Kingsbury, *United Nations: Divided World* (Oxford: OUP, 2<sup>nd</sup> ed. 1993), 81 p.91; R. Higgins, “The Development of International Law Through the Political Organs of the United Nations” (1965) 59 *Proc. A.S.I.L.* 116, p.119.

<sup>130</sup> O. Schachter, “Review of Kelsen, *The Law of the United Nations*” (1951) 61 *Yale L.J.* 189, p.193.



Here the argument revolves around Article 41, which states “the Security Council may decide what measures not involving the use of armed force are to be employed... and it may call upon the Members of the United Nations to apply such measures. These may include...”. An important point to note in this respect is that as it is the Security Council which is given the primary role in determining the measures to be taken, its acts are to enjoy a (rebuttable) presumption of legality.<sup>131</sup> Even more important is that the list of actions “include[s]” the instances given (not including the creation of courts) thus it is not a closed list.<sup>132</sup> The real question is not, as Fox thinks, whether States have implicitly conferred criminal jurisdiction on the Security Council,<sup>133</sup> but if they have conferred upon the Council the authority to determine what it may do to restore or maintain international peace and security.

It is clear that the Security Council has the power to set up subsidiary bodies.<sup>134</sup> It is true that the Security Council does not have judicial powers,<sup>135</sup> but it has previously created bodies exercising certain judicial functions, for example sanctions committees and the UN Compensation Commission.<sup>136</sup>

The ICJ in the *Effect of Awards Case* confirmed the authority of organs of international organisations to create judicial organs in the exercise of their functions despite their lack of judicial powers. There the ICJ stated “the Charter does not confer judicial functions on the General Assembly... [but by creating a judicial body]... the General Assembly was not delegating the performance of its own functions: It was exercising a power which it had under the Charter to regulate staff relations.”<sup>137</sup> The ICTY’s reliance on this judgment has been criticised, on the basis that this case was referring to an internal UN matter, whereas

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<sup>131</sup> See *Certain Expenses of the United Nations Case* (1962) *ICJ Rep.* 151, p.168, Higgins, *supra* n.129; N.D. White, *The Law of International Organisations* (Manchester: MUP, 1996) pp.119-125.

<sup>132</sup> *Tadic*, *supra* n.125, para 35. See also *Prosecutor v Kanyabashi*, Decision on the Defence Motion on Jurisdiction, 18 June 1997, ICTR-96-15-T, para 29.

<sup>133</sup> H. Fox, “The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal” (1997) 46 *I.C.L.Q.* 434, p.435.

<sup>134</sup> By virtue of Articles 7(2) and 29 of the UN Charter. See generally, D. Sarooshi, *supra* n.123.

<sup>135</sup> *Tadic*, *supra* n.125, para 38. Greenwood, *supra* n.125, p.103

<sup>136</sup> Resolution 687, UN Doc S/RES/687, See White *supra* n.122, p.96, see also K. Harper “Does the United Nations Security Council have the Competence to Act as a Court and a Legislature?” (1994) 27 *N.Y.U.J.I.L. & Politics* 103.



creating the ICTY was an external matter.<sup>138</sup> This is to confuse the general part of the judgment, allowing the creation of judicial bodies by non-judicial bodies, with the particular power used in that instance (the power to regulate staff relations). In the creation of the ICTY, the Security Council used its Chapter VII powers, which are clearly not related to internal UN matters, but the (external) maintenance of international peace and security. In this respect, therefore it is difficult to disagree with Greenwood that “there seems no reason in principle why the Security Council, if it considers that the creation of a judicial instrument is necessary for it to effectively perform its functions in respect of peace and security, should not create such an instrument.”<sup>139</sup>

The only issue that could be raised is the delegation of authority by the Security Council to the ICTY. The power of the Security Council to delegate is given by Articles 7(2) and 29. The Secretary General considered the ICTY to be a subsidiary organ within the terms of Article 29. To delegate under Article 29, the Security Council needs to delegate one of its functions, here, as mentioned above, the Security Council was not delegating one of its own functions, but a judicial one.<sup>140</sup> This does not mean that there was an improper delegation however, as Article 7(2) allows the creation of subsidiary bodies by the Security Council without the limitation on functions that may be delegated.<sup>141</sup>

The legal basis for the Security Council’s creation of the ICTY is generally supported by States<sup>142</sup> (particularly in the General Assembly),<sup>143</sup> and has been entrenched by the repetition of the actions for the ICTR<sup>144</sup> and the provisions of the Rome Statute allowing the Council to send cases to the ICC.<sup>145</sup> Thus the question is now of less practical import.

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<sup>137</sup> *Certain Expenses* case, *supra* n.131, p.61.

<sup>138</sup> Greenwood, *supra* n.125, p.103; Klodokin, *supra* n.123, p.174.

<sup>139</sup> Greenwood, *ibid.* p.104.

<sup>140</sup> See Sarooshi, *supra* n.123, p.431.

<sup>141</sup> *Ibid.* pp.426-431.

<sup>142</sup> See P.C. Szasz, “Centralized and Decentralized Law Enforcement: The Security Council and the General Assembly Acting Under Chapters VII and VIII” in J. Delbrück (ed.) *Allocation of Law Enforcement Authority in the International System* (Berlin: Duncker & Humboldt, 1995) 17, p.33.

<sup>143</sup> GA Resolution 48/88, UN Doc. A/RES/48/88, welcomed the creation of the ICTY.

<sup>144</sup> See *infra* n.146ff. and accompanying text.

<sup>145</sup> See *infra*, p.90.

What is relevant for this study is that the ICTY was set up by an organ of an international organisation under the powers delegated to it by States under a treaty. Its basis is international. It is also worth noting that this method is more reminiscent of the method of creation of the Tokyo IMT than it is of the Nuremberg “precedent”.

#### THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR)

Soon after the creation of the ICTY, another conflict arose that shocked many members of the UN, to which the response from the Security Council showed the impact of the creation of the ICTY. In Rwanda genocide was perpetrated in full view of the UN.<sup>146</sup> Early in the genocide ten Belgian peacekeepers were killed. Within a fortnight this led to the reduction of the peacekeeping force from over 1,500 to 270 by virtue of Resolution 912.<sup>147</sup> The Council began its actions on the atrocities in Rwanda quietly. As in Yugoslavia, it began by condemning violations of humanitarian law (not genocide, which was conspicuously absent from the statement) in Rwanda, but only in a Presidential statement.<sup>148</sup> Stung by criticism, after the Rwandan Patriotic Front had asked for an international tribunal, the Security Council mandated the Secretary General to investigate the Rwandan situation.<sup>149</sup> The Secretary General’s Special Rapporteur for Rwanda broke the taboo surrounding describing the activities in Rwanda as genocide, and reported that genocide was occurring there. As a result, the Security Council passed Resolution 925,<sup>150</sup> which acknowledged that genocide had occurred.<sup>151</sup> From this, the Security Council (not without some reservations) went on to create a Commission of Experts for Rwanda.<sup>152</sup> As in Yugoslavia, in between the submission of the interim and final report of the

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<sup>146</sup> On the conflict generally see G. Prunier, *The Rwanda Crisis* (London: Hurst & Co. 1997) A. Destexhe, *Rwanda and Genocide in the 20<sup>th</sup> Century* (Cambridge: Pluto Press, 1995); P. Gourevitch, *We Wish to Inform You That Tomorrow We Will be Killed With Our Families* (London: Picador, 1998).

<sup>147</sup> UN Doc. S/RES/912.

<sup>148</sup> UN Doc. S/PRST/1994/21. See J. Karhilo, “The Establishment of the International Criminal Tribunal for Rwanda” (1995) 64 *Nordic J.I.L.* 683, pp.689-90.

<sup>149</sup> Resolution 918, UN Doc. S/RES/918. See Karhilo, *ibid.*, p.689.

<sup>150</sup> UN Doc. S/RES/925.

<sup>151</sup> See, on this V. Morris & M.P. Scharf, *The International Criminal Tribunal for Rwanda* (New York: Transnational, 1998) pp.59-64.

<sup>152</sup> Resolution 935, UN Doc. S/RES/935. See Morris & Scharf, *ibid.*, p.65.



Commission, the Security Council, responding to many calls for an international tribunal, (including one from the new government of Rwanda)<sup>153</sup> promulgated Resolution 955.<sup>154</sup> This created the ICTR, and annexed its Statute. The Statute was drafted not by the Secretary General, but New Zealand and the US, with input from the (new) Rwandan government.<sup>155</sup>

Although the ICTR was set up as a separate institution, the Security Council decided to set it up with institutional links to the ICTY. The most important of these are the provision for the same prosecutor to act for both tribunals and the extension of the jurisdiction of the ICTY Appeals Chamber to hear appeals from the ICTR, which has no Appeals Chamber of its own.<sup>156</sup> This was done to ensure a coherent legal approach between the two tribunals,<sup>157</sup> and for reasons of cost. Bassiouni claims that neither of these reasons is convincing,<sup>158</sup> and the Rwandan government was clear that this was one of the reasons that it voted against the creation of the ICTR.<sup>159</sup>

This aside, the legal authority did not come from the consent of Rwanda, but Chapter VII of the UN Charter.<sup>160</sup> In Resolution 955 the Security Council noted the request of Rwanda, but if Rwandan consent had been the ICTR's legal basis, this would have been negated by its vote against the Resolution. As the Secretary General noted in his first report on the Rwanda Tribunal, the ICTR was set up under Chapter VII to ensure the co-operation of all parties (including Rwanda) for the duration of the ICTR's lifetime, as well as (like the ICTY) for speed.<sup>161</sup> This was taken a step further in the Rwandan situation by creating the Tribunal without asking the Secretary General to draft the Statute, allowing

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<sup>153</sup> the Formal Request was sent to the Security Council on 28 September 1994. Letter Dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council, UN Doc. S/1994/1115.

<sup>154</sup> UN Doc. S/RES/955. See Morris & Scharf, *supra* n.151, pp.65-73.

<sup>155</sup> R. Lee "The Rwanda Tribunal" (1996) 9 *L.J.I.L.* 37, p.39.

<sup>156</sup> Article 15(2) and 12(2) of the ICTR Statute respectively. See P. Akhavan, "The International Tribunal for Rwanda: The Politics and Pragmatics of Punishment" (1996) 90 *A.J.I.L.* 501, p.503.

<sup>157</sup> C. Aptel, "The International Criminal Tribunal for Rwanda" (1997) 321 *I.R.R.C.* 675, p.676.

<sup>158</sup> Bassiouni, *supra* n.64, p.47.

<sup>159</sup> S/PV.3454, p.11.

<sup>160</sup> L. Johnson, "The International Tribunal for Rwanda" (1996) 67 *R.I de Dr. Pénal* 211 at p215; Lee, *supra* n.155, p.41.

<sup>161</sup> Report of the Secretary General Pursuant to Paragraph 5 of Security Council Resolution 955. UN Doc. S/1995/134, para 6.



the members of the Security Council to draft it.<sup>162</sup> That said, the legal basis is basically the same as that of the ICTY.<sup>163</sup> In other words, it was an Article 41 response to a threat to the peace determined by the Security Council. Thus most of the same arguments which applied to the ICTY apply here. The only difference being the fact that there was no attempt to claim that there was an international armed conflict creating a threat to the peace. A defendant before the ICTR, who challenged the creation of the ICTR, attempted to avoid trial by relying on this argument. In *Prosecutor v Kanyabashi*, the defendant challenged the creation of the tribunal on this ground and additionally on the basis that the Security Council could not create a court. The ICTR dealt with his contentions in a rather summary fashion, effectively refusing to second-guess the Council in any way.<sup>164</sup> They claimed that the determination of a threat to the peace was totally within the discretion of the Security Council,<sup>165</sup> and that as Article 41 was not exhaustive, the Security Council could choose to create the Tribunal.<sup>166</sup>

The legality of the ICTR's creation was perhaps less controversial, given that the precedent had already been set in 1993. In the Security Council, both Brazil and China, who had queried the Council's power here when the ICTY was created, repeated their doubts about the legality of the creation of international courts.<sup>167</sup> Their doubts are of reduced weight given that on two occasions both States had refused to vote against the resolutions on grounds of legality.<sup>168</sup> One country outside the Security Council queried the creation of the ICTR. This was Kenya, who adopted a hostile position to the ICTR.

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<sup>162</sup> This can also be seen as a way of returning the authority to define the law to the member States of the Security Council, some of who were unhappy about the law in the ICTY Statute.

<sup>163</sup> Secretary General's Report, *supra* n.161, paras 8-9.

<sup>164</sup> *Kanyabashi supra* n.132, paras 17-32 See V. Morris, "International Decisions: Prosecutor v Kanayabashi" (1998) 92 *A.J.I.L.* 66.

<sup>165</sup> *Ibid.*, para 20, they did note that as a conflict it was clearly a threat, and that sudden migration had been accepted as a threat to the peace (*ibid.* para 19). It is clear that civil wars and mass transborder migrations can be a threat to the peace, see White *supra* n.122, pp.42-47. In fact, the Security Council, in Resolution 955 referred to the atrocities as the threat to the peace (see S/PV. 3453 p.7 (Pakistan)). This is also an accepted threat to the peace, White *ibid.* pp.44-5; R. Cryer, "The Security Council and Article 39: A Threat to Coherence" (1996) 1 *J.A.C.L.* 161, pp.181-182.

<sup>166</sup> *Ibid.*

<sup>167</sup> S/PV.3453 pp.6-7, 7 respectively. See D. Schraga & R. Zacklin, "The International Criminal Tribunal for Rwanda" (1996) 7 *E.J.I.L.* 501, p.505.

<sup>168</sup> Brazil voted for both Resolution 827 and 955, China voted for 827, but abstained on Resolution 955, on different grounds (that more consultation to accommodate Rwanda should have been undertaken. (S/PV. 3453 p.7)).

After discussions with the Security Council, Kenya officially accepted the legality of the Tribunal.<sup>169</sup> The power of the Security Council to create such tribunals pursuant to Chapter VII appears to have been confirmed by the creation of the ICTR and the acceptance of this by States.

### THE INTERNATIONAL CRIMINAL COURT (ICC)

The history of a permanent international criminal court is a long one, beginning at least as early as 1872, with the proposal for an international court to punish violations of the first Geneva Convention.<sup>170</sup> No action was taken on this. After WWI, the idea regained currency, with proposals for an international tribunal coming from an League of Nations Advisory Committee in 1921, as a means of overcoming the problems encountered in prosecuting offences from that war.<sup>171</sup> Consideration of the idea then fell into the unofficial arena, with the International Law Association drafting a statute in 1926.<sup>172</sup> Other bodies, such as the Inter-Parliamentary Union, the International Congress of Penal Law and Pan-American Conference also recommended the creation of a court.<sup>173</sup> These all remained little more than debated topics, rather than concrete plans. The assassination of King Alexander of Yugoslavia led to the most advanced proposal. The League of Nations drafted, adopted, and opened for signature a statute for an international criminal court. The court was to enforce the (separate) convention for the prevention of terrorism.<sup>174</sup> The convention remained unratified.

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<sup>169</sup> Letter Dated 11 October 1995 From the Permanent Representative of Kenya to the United Nations Addressed to the President of the Security Council. UN Doc. S/1995/861. See Morris & Scharf, *supra* n.151, pp.656-7.

<sup>170</sup> See C.K. Hall, "The First Proposal for a Permanent International Criminal Court" (1998) 322 *I.R.R.C.* 57.

<sup>171</sup> McCormack, *supra* n.22, pp51-2. These were not taken up. *Ibid.* p.52. See also Lord Phillimore, "An International Criminal Court and the Resolutions of the Committee of Jurists" (1922-3) 3 *B.Y.B.I.L.* 79.

<sup>172</sup> *Report of the 34<sup>th</sup> Conference* (ILA) 1927; see McCormack, *ibid.* p.53, for criticism, see J. Brierly, "Do We Need an International Criminal Court" (1927) 8 *B.Y.B.I.L.* 81.

<sup>173</sup> UNWCC, *supra* n.23, pp.439-440.

<sup>174</sup> 1937 Convention for the Creation of an International Criminal Court, (1938) League of Nations Official Journal Special Supp. 156. Signed by thirteen States, never in force. See McCormack, *supra* n.22, p.54. The separation of the conventions was indicative of the controversy, many in the proposing body were dubious about the possibility of the court.



After WWII and the Nuremberg and Tokyo IMTs, the idea of an international criminal court was put on the agenda of the United Nations by General Assembly Resolution 177.<sup>175</sup> In 1950 two Special Rapporteurs gave conflicting reports on the current desirability of an international criminal court.<sup>176</sup> After this, the question was passed to a committee of seventeen State representatives in the General Assembly, who produced two draft statutes in 1951 and 1953.<sup>177</sup> Due to the Cold-War, these proposals were stillborn, and in 1954 the question was shelved pending the definition of aggression.<sup>178</sup> Nothing of note occurred in official fora until 1989 when, in response to the request of a coalition of sixteen Caribbean and Latin American States (led by Trinidad and Tobago), the General Assembly asked the ILC to look at the possibility of an international criminal court to enforce the (then unwritten) draft code of offences against the peace and security of mankind.<sup>179</sup>

Some progress had been made by 1992,<sup>180</sup> when the General Assembly asked the ILC to begin work on a draft statute,<sup>181</sup> but many States remained sceptical, and some were actively opposed.<sup>182</sup> The procedures in the ILC were “going around in circles and getting nowhere”.<sup>183</sup> By 1993, and partially as a result of the creation of the ICTY, States

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<sup>175</sup> UN Doc. A/1316. On this period see Bassiouni, *supra* n.64, pp.49-54, McCormack, *ibid.* pp.59-62; L. Sadat-Wexler, “The Proposed International Criminal Court: An Appraisal” (1996) 29 *Cornell I.L.J.* 665, pp.676-679.

<sup>176</sup> Report of the International Law Commission on the Question of International Criminal Jurisdiction UN GAOR 5<sup>th</sup> Sess. UN Docs. A/CN.4/ 15 & 20. See B. Broms, “The Establishment of an International Criminal Court” in Y. Dinstein & M. Tabor (eds.), *War Crimes in International Law* (The Hague: Martinus Nijhoff, 1996) 183 pp.183-184.

<sup>177</sup> *Report of the Committee on International Criminal Jurisdiction*, UN Doc. A/2136 and *Report of the 1953 Committee on International Criminal Jurisdiction*, UN Doc. A/2638.

<sup>178</sup> GA Resolution 898, UN Doc. A/2890. See Bassiouni, *supra* n p.53; Sadat-Wexler, *supra* n.175 p.679-683.

<sup>179</sup> GA Resolution 44/39, UN Doc. A/RES/44/39. Before this, Professor Bassiouni had been asked, by the UN Mission for Human Rights to prepare a draft statute for a court to implement the Apartheid convention (UN Doc. E/CN.4/1416) (1980) Nothing was done about his proposal. See M.C. Bassiouni & C. Blakesely, “The Time has Come for an International Criminal Court” (1992) 25 *Vanderbilt J.T.L.* 151, p.157. In 1987 the USSR had raised the issue of a court in relation to terrorism, again, nothing was done. Bassiouni & Blakesley, *ibid.* p.156. J. Dugard, “Obstacles in the way of an International Criminal Court” (1997) 56 *Cambridge L.J.* 329, p.330 notes a political upturn towards the idea in the 1980s.

<sup>180</sup> See B. Ferencz, “An International Criminal Code and Court: Where they Stand and Where They’re Going” (1992) 30 *C.J.T.L.* 375.

<sup>181</sup> GA Resolution 47/33, UN Doc. A/RES/47/33.

<sup>182</sup> *Supra* n.180, pp.387-390; M.P. Scharf, “The Jury is Still Out on an International Criminal Court” (1991) 1 *Duke J.C. & I.L.* 135; M.P. Scharf, “Getting Serious About an International Criminal Court” (1994) 6 *Pace I.L.R.* 103, p.103-4.

<sup>183</sup> Ferencz, *ibid.* p.390. This was partially as a result of the US deliberately raising problems, but not answers, in an effort to stall matters, Scharf (Serious) *ibid.* p.105.



(particularly the US) began to become more flexible.<sup>184</sup> In 1993 this led the ILC to come up with a draft statute which borrowed heavily from that of the ICTY.<sup>185</sup> The General Assembly expressed its appreciation and asked the ILC to complete its work on the statute by 1994.<sup>186</sup> The ILC did this, adopting a draft statute in 1994.<sup>187</sup> The General Assembly set up an *ad hoc* committee of States to look at the matter,<sup>188</sup> then in 1995 set up the Preparatory Commission for an International Criminal Court (PREPCOM). This was mandated to look at the ILC Draft and to try to come up with a consolidated text of proposals for an international conference to create a treaty for an international criminal court.<sup>189</sup> This was done in time for the Rome Conference on an International Criminal Court, which met in June-July 1998, and which adopted the Rome Statute of the International Criminal Court.<sup>190</sup> The Statute will come into force shortly after the 60<sup>th</sup> ratification has been received.<sup>191</sup>

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<sup>184</sup> Scharf, *ibid.* pp.106-7.

<sup>185</sup> *Report of the ILC on the Work of its Forty-Fifth Session, Report of the Working Group on a Draft Statute for an International Criminal Court*, UN Doc. A/48/CN.4/Ser.A/1993/Add.1 pp.100-132. See J. Crawford, "The ILC's Draft Statute for an International Criminal Tribunal" (1994) 88 *A.J.I.L.* 140. For criticism see Scharf, *ibid.* pp.109-118. Interestingly the ILC sent the Statute straight from the working group dealing with the matter, to the General Assembly, rather than adopt it themselves first, which is the normal procedure, but which would have taken time. Also they went beyond what the Resolution 47/33 had asked them to do, which was to merely give a progress report in 1993.

<sup>186</sup> GA Resolution 48/31, UN Doc. A/RES/48/31.

<sup>187</sup> *Report of The ILC on the Work of its Forty-Sixth Session* UN Doc. A/49/10. See J. Crawford, "The ILC Adopts a Statute for an International Criminal Court" (1995) 89 *A.J.I.L.* 404, Sadat-Wexler, *supra* n.175, pp.685-726.

<sup>188</sup> GA Resolution 49/53, UN Doc. A/RES/49/53, M.C. Bassiouni, "Observations Concerning the 1997-8 Preparatory Committee's Work" in M.C. Bassiouni (ed.) *The International Criminal Court: Observations and Issues Before the Preparatory Committee; and Administrative and Financial Implications* 13 *Nouvelles Études Pénales*, (Chicago: Érés, 1997), 5 pp.8-9 claims that this was a stalling movement by recalcitrant States.

<sup>189</sup> GA Resolution 50/46, UN Doc. A/RES/50/46, the mandate was extended by GA Resolution 51/207 UN Doc. A/RES/51/207. On the PREPCOM's work, see *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc. A/51/22 and C.K. Hall, "The First two Sessions of the Preparatory Committee on the Establishment of an International Criminal Court" (1997) 91 *A.J.I.L.* 177; C.K. Hall, "The Third and Fourth Sessions of the Preparatory Committee for an International Criminal Court" (1998) 92 *A.J.I.L.* 124; C.K. Hall, "The Fifth Session of the Preparatory Committee on the Establishment of an International Criminal Court" (1998) 92 *A.J.I.L.* 331. C.K. Hall, "The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court" (1998) 92 *A.J.I.L.* 548; A. Zimmerman, "The Creation of a Permanent International Criminal Court" (1998) 2 *Max Planck Y.B.U.N.L.* 169.

<sup>190</sup> A/CONF.183/9, *reprinted in* (1998) 38 *I.L.M.* 999. On the drafting process see P. Kirsch & J.T. Holmes, "The Rome Conference on an International Criminal Court: The Negotiating Process" (1999) 93 *A.J.I.L.* 2; P. Kirsch & J.T. Holmes, "The Birth of the International Criminal Court: The 1998 Rome Conference" (1998) 36 *C.Y.B.I.L.* 3; M.C. Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court" (1999) 32 *Cornell I.L.J.* 443. For a US view see D.J. Scheffer, "The United States and the International Criminal Court" (1999) 93 *A.J.I.L.* 12, see also, R. Wedgwood, "Fiddling at Rome: The United States and the International Criminal Court" (1998) 77 *Foreign Policy* 20, M. Zwanenburg, "The Statute for an International Criminal Court and the United States: Peace Without Justice" (1999) 12 *L.J.I.L.* 1. On the statute, M.H. Arsanjani, "The Rome Statute for an International Criminal Court" (1999) 93 *A.J.I.L.* 22; M-C. Roberge, "The new International Criminal Court: A Preliminary Assessment" (1998) 325 *I.R.R.C.* 671; O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999); R.S. Lee, *The Making of the Rome Statute* (The Hague: Kluwer, 1999); D. McGoldrick, "The International Criminal Court: An End to the Culture of Impunity?" [1999] *Crim. L.R.* 627; R. Cryer, "Commentary on the

As should be clear from the above the ICC will be set up by a treaty. There had been calls for the ICC to be set up by a Security Council resolution,<sup>192</sup> but the general consensus is that the Security Council does not have the power to set up a permanent body in the absence of an identified threat to the peace.<sup>193</sup> Probably the least controversial part of the negotiations for an international criminal court was that it would be set up by treaty. This was accepted as early as the 1992 Working Group.<sup>194</sup> As a result, the basis is beyond doubt in international law, namely, the Rome Statute.<sup>195</sup>

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## APPLICABLE LAW

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### NUREMBERG

There has been some controversy relating to the law applied by the Nuremberg IMT. Kranzbühler, for example, asserts that “the rules that were applied in this trial were not, as is generally assumed, rules of international law”,<sup>196</sup> and that the law was merely (national) law defined by the Allies. A look at the views of the drafters is worthwhile. Perhaps the best summary of the way in which the issues arose is given by Gross: “[t]he problem facing the Four powers can be reduced to this: either the Tribunal is directed to apply international law and find this law using the traditional methods of international tribunals, or the Tribunal is directed simply to apply the law laid down by the four powers”.<sup>197</sup> In furtherance of limiting the power of the Nuremberg IMT to decide what international law said about criminality, the US pushed for the removal of all references to international law.<sup>198</sup> This said, the debate in the London conference was based around international law, with much discussion being based around the extent to which the

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Rome Statute for the International Criminal Court: A Cadenza for the Song of Those who Died in Vain?” (1998) 3 *J.A.C.L.* 271.

<sup>191</sup> Rome Statute, Article 36.

<sup>192</sup> Dugard, *supra* n.179, pp.341-342.

<sup>193</sup> K. Ambos, “The Establishment of an International Criminal Court: some Observations from an International Criminal Law Viewpoint” (1996) 7 *E.J.I.L.* 519, p.522.

<sup>194</sup> See Crawford, *supra* n.185, pp.142-3.

<sup>195</sup> Rome Statute, Article 1.

<sup>196</sup> O. Kranzbühler, “Nuremberg, Eighteen Years Afterwards” (1965) 14 *De Paul L.R.* 333, p.337.

<sup>197</sup> Gross, *supra* n.25, p.143.



crimes were accepted under international law.<sup>199</sup> In reality, although international law was the basis around which they worked, David Maxwell-Fyfe summed up what was occurring at the London conference: “I want to make clear in this document what are the things for which the Tribunal can punish the defendants. I don’t want it left to the Tribunal to interpret what are the principles of international law that it should apply... it should not be left to the Tribunal to say what is or what is not a violation of international law... What we want to abolish at the trial is a discussion as to whether the acts are violations of international law or not. We declare what international law is...”<sup>200</sup>

Effectively what was happening was that although the four powers were utilising international law for the Nuremberg IMT, they were also imposing their view of what international law said rather than allowing the Nuremberg IMT to discover international law for itself. The extent to which the Nuremberg Charter represented the pre-existing international law will be dealt with in chapters 5 and 6.<sup>201</sup>

In some ways, though, the view that the Nuremberg IMT was using occupation law could be supported by the IMT itself. The Nuremberg IMT Judgment asserted that “the making of the Charter was an exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these territories has been recognised by the civilised world.”<sup>202</sup> These could be seen as implications that the Nuremberg IMT was applying occupation law, but the judgment continued, “[t]he Charter is not an arbitrary exercise of power on behalf of the victorious nations, but in the view of the Tribunal... is the expression of international law existing at the time of its creation.”<sup>203</sup> Kranzbühler counters this assertion by claiming that the IMT was merely declaring that Article 6 of the Charter (which gave the crimes over which the

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<sup>198</sup> *Ibid.* p.144, See Jackson’s Report, *supra* n.33, pp.197,205, 352, 359, 373,378, 390-395

<sup>199</sup> Y. Beigbader, *Judging War Criminals: The Politics of International Criminal Justice* (Basingstoke: Macmillan, 1999) p.41, M. Lippmann, “Nuremberg Forty Five Years Later (1991) 7 *Connecticut J.I.L.* 1 p.23, both discussing proposals relating to international law.

<sup>200</sup> Jackson’s Report, *supra* n.33, pp.328-9, 399.

<sup>201</sup> In some ways, the Jackson Report itself seems to accept they were modifying international law, by referring to the Charter as “a basic charter for the international law of the future” *ibid.*, p. 437.

<sup>202</sup> Nuremberg IMT Judgment, *supra* n.44, p.216.

<sup>203</sup> *Ibid.*



IMT had jurisdiction) was coterminous with international law, but was applicable there as national law.<sup>204</sup>

Kranzbühler's interpretation sits uneasily with the above phrase, and also with various other parts of the judgment. The most telling of these is the Nuremberg IMT's pronouncement that "the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State".<sup>205</sup> It is quite clear that the Nuremberg IMT considered itself to be applying international law, as much is also clear from the later opinion of the President of the tribunal.<sup>206</sup>

Any doubts about the form of the law can be dispelled by reference to General Assembly Resolution 95, which affirmed "the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal".<sup>207</sup> This clearly shows that the General Assembly considered the Nuremberg IMT to be using international law.

In relation to the procedures used, they were clearly not those of the national courts of the four powers. The Charter blended the approaches, coming up with its own hybrid. For example, contrary to common law practice, there were no exclusionary rules of evidence,<sup>208</sup> and in a mixture of both procedures, the indictment was to give details of the particulars of the offences, but was not to include all the evidence.<sup>209</sup> Jackson summed the position up admirably, "[a]s an international Tribunal, it is not bound by the procedural and substantive refinements of our respective judicial or constitutional systems".<sup>210</sup>

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<sup>204</sup> Kranzbühler, *supra* n.45, p.109.

<sup>205</sup> Nuremberg IMT Judgment, *supra* n.44, p.220, see also *ibid.* p. 221 referring to "crimes under international law" and p.226 where acts are said to be "in complete violation of international law".

<sup>206</sup> G. Lawrence, "The Nuremberg Trial" (1947) 23 *I. Aff.* 151, p.151.

<sup>207</sup> GA Resolution 95(I), UN Doc. A/64/Add.1.

<sup>208</sup> Nuremberg IMT Charter, Article 19.

<sup>209</sup> Nuremberg IMT Charter, Article 16(a).

<sup>210</sup> 19 Nuremberg Proceedings, *supra* n.43, p.383.

Sentencing was at the discretion of the Nuremberg IMT, who could impose any punishment they thought just, without reference to any national law.<sup>211</sup>

## TOKYO IMT

Less is known about the drafting of the Tokyo IMT's charter, as it was prepared unilaterally by the US, primarily the IMT chief prosecutor Joseph Keenan. From his defence of the Tokyo IMT, it seems clear that he intended the Tokyo IMT to enforce international crimes.<sup>212</sup> In addition, the Tokyo IMT was created as a sibling for the Nuremberg proceedings, so many of the same considerations relating to that Tribunal's Charter pertain equally to the Tokyo Charter.<sup>213</sup>

The majority opinion of the Tokyo IMT adds little to the conclusions reached at the Nuremberg IMT in relation to the law applied, as they preferred to express their “unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew.”<sup>214</sup>

More substantial help can be gleaned from the separate and dissenting opinions. It is clear that the judges writing these opinions considered the Tokyo IMT Charter's provisions relating to crimes to be jurisdictional alone, allowing them to prosecute crimes which existed under international law, to the extent to which they were accepted at the time in international law.<sup>215</sup> The most interesting views were those expressed by judges Röling and Pal, both of whom would not have applied the Charter in excess of what they considered to be international law at that time. Judge Röling expressed himself thus; “[t]he Charter determines which facts may be subjected to a legal hearing. The

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<sup>211</sup> Nuremberg IMT Charter, Article 27.

<sup>212</sup> Keenan & Brown, *supra* n.67, p.9.

<sup>213</sup> In particular, that in the formulation of the Charters, the Allies imposed their (controversial) view of international law on the Tribunals.

<sup>214</sup> Tokyo IMT Judgment, *supra* n.66 p.48,439.

<sup>215</sup> See Webb, *supra* n.93, p6. Jaranilla, *supra* n.98, p.18, “[an international tribunal] may legally try and punish individuals who have violated the laws and customs of wars which... are considered part of the law of nations” Bernard, *supra* n.95, p.18. relies on natural law, but also p.1 refers to acts “supposed to be in criminal infraction of natural and international law”.

Tribunal... will determine which of those facts are crimes under international law.”<sup>216</sup> Judge Pal was entirely unambiguous on this point, stating that the law applicable to the case was “international law as may be found by us.”<sup>217</sup> He took this to its logical conclusion by refusing to convict on charges he did not consider established as international crimes.<sup>218</sup>

In all, the judges were quite clearly of the opinion that they were applying international law. In relation to the procedure, as at Nuremberg, they were not bound by national procedures,<sup>219</sup> nor were they bound by any national sentencing rules.<sup>220</sup> Thus, it may be said that the Tokyo IMT was applying international law.

## ICTY

There is little doubt that the applicable law in the ICTY is international law. From the beginning, this was the intention, as the French government commented to the Secretary General “the essential starting point would seem to be the international character of the crimes themselves”.<sup>221</sup> The Secretary General took this on board, saying that the tribunal was only to enforce crimes which were “beyond any doubt part of customary international law”.<sup>222</sup> The crimes over which it has jurisdiction are discussed in detail in Part 3.<sup>223</sup> It is clear that the ICTY Chambers have considered themselves to be applying international law. For example, the *Tadic* judgment clearly adopted the position that the provisions of the ICTY Statute setting out the crimes are jurisdictional rather than substantive: “Articles 2,3,4, and 5 specify the crimes under international law over which

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<sup>216</sup> Opinion of Juge Röling, *supra* n.100, p.6, see also p.5, “the interpretation which considers the Charter as giving rules of jurisdiction and procedure only is indicated by the very constitution of the tribunal”.

<sup>217</sup> Opinion of Judge Pal, *supra* n.66, Vol 21: *Separate Opinions*, p.26.

<sup>218</sup> *Ibid.* p.153.

<sup>219</sup> Tokyo IMT Charter, Article 13.

<sup>220</sup> Article 16 gave the Tokyo IMT the right to impose the punishment “determined by it to be just”.

<sup>221</sup> Letter from the French *Charge d'affaires*, UN Doc. 25266, para 52. The only proposal that suggested the use of national law was the CSCE approach, (*supra* n.118).

<sup>222</sup> Secretary-General's Report, *supra* n.118 para 34.

<sup>223</sup> For the moment it is only necessary to mention that they are Grave Breaches of the Geneva Conventions (Article 2), Violations of the Laws and Customs of War (Article 3) Genocide (Article 4) and Crimes Against Humanity (Article 5).



the International Tribunal has jurisdiction".<sup>224</sup> In the course of their judgments, the ICTY has dedicated a large amount of space and reasoning to the applicable rules of international law,<sup>225</sup> and has been wary of any application of national law.<sup>226</sup> They have looked at national law, but only to derive general principles of law, a source of international law.<sup>227</sup>

In respect to procedure, it is clear that the procedure is not subject to the national law of any state, and represents a hybrid, with the judges being wary of national laws.<sup>228</sup> In

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<sup>224</sup> *Prosecutor v Tadic* Opinion and Judgment, 7 May 1997, IT-94-1-T para 558. See also *Prosecutor v Delalic et al*, Decision on Application for Leave to Appeal (Form of the Indictment), 15 October 1996, IT-96-21-AR72.5, para 26, "The Tribunal's Statute does not create new offences but rather serves to give the Tribunal jurisdiction over offences which are already part of customary international law".

<sup>225</sup> *Prosecutor v Erdemovic* Judgment, 7 October 1997, IT-96-22-A, Separate Opinion of Judges McDonald & Vohrah paras 32-51; Dissenting Opinion of Judge Cassese, paras 20-39, Separate Opinion of Judge Li para 2; *Prosecutor v Furundzija*, Judgment, 10 December 1998, IT-95-17/1-T, paras 134-257; *Prosecutor v Delalic, Mucic, Delic & Landzo*, Judgment 16 November 1998, IT-96-21-T, paras 158-593; On these see D. Turns, "The International Criminal Tribunal for the Former Yugoslavia: The Erdemovic Case" (1998) 47 *I.C.L.Q.* 461; O. Swaak-Goldman, "International Decisions: Prosecutor v Erdemovic" (1998) 92 *A.J.I.L.* 282; S. Linton, "Reviewing the Case of Drazen Erdemovic: Uncharted Waters at the International Criminal Tribunal for the Former Yugoslavia" (1998) 12 *L.J.I.L.* 251; R. Cryer, "One Appeal, Two Philosophies, Four Opinions and a Remittal: The Erdemovic Case at the ICTY Appeals Chamber" (1997) 2 *J.A.C.L.* 195; M.P. Scharf, "International Decisions: Prosecutor v Tadic" (1997) 91 *A.J.I.L.* 718.

<sup>226</sup> *Erdemovic* *ibid.* Dissenting Opinion of Judge Cassese, para 2, "To my mind, notions, legal constructs and terms of art should not be automatically applied at the international level. They cannot be mechanically imported into international criminal law proceedings". See also, *Blaskic* (*Prosecutor v Blaskic*, Decision on the Request for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, IT-95-14-AR108bis) para 23 "domestic judicial views or approaches should be handled with the greatest caution at the international level, lest one should fail to make due allowance for the unique characteristics of international criminal proceedings".

<sup>227</sup> ICJ Statute, Article 38(1)(c). The ICTY's approach is clear from *Erdemovic*, where McDonald and Vohrah criticised the prosecution for relying on "decisions of national military tribunals which applied national law, not international law" para 52. See also Cassese, *ibid.* where he sifted cases for those that applied national law from those applying international law, and being dubious of the former, *ibid.* paras.20-39.

<sup>228</sup> Article 15 gives the ICTY judges the power to adopt their own rules of procedure, Rules 89 of the ICTY Rules of Procedure (IT/32/Rev. 17) provides that national rules of evidence are not binding on the ICTY. See H. Levie, "The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look to the Future" (1995) 21 *Syracuse J of I.L. & Commerce* 1, pp. 16-17; W.J. Fenrick, *Report Concerning the Practice of the International Criminal Tribunal for the Former Yugoslavia* (unpublished manuscript, on file with author) p.1; On other procedural aspects see *Erdemovic*, *ibid.* Separate Opinion of Judges McDonald & Vohrah, paras 3-16, Dissenting Opinion of Judge Cassese paras 1-10. It could be thought that McDonald and Vohrah, went dangerously close to accepting the applicability of certain common law decisions relating to guilty pleas. They claimed it was necessary given that the guilty plea procedure was transposed from those systems, (para 6) and the rules themselves necessarily implied reference. So to interpret the rules, they could refer to national law. But this must be read in light of their comment (para 9) that "we do not in any way consider the common law authorities as binding upon us, we merely consider them relevant material, throwing light on the proper construction to be given to the guilty plea as employed in the procedure of the International Tribunal". A particularly controversial decision was *Prosecutor v Tadic* Decision on the Prosecution Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, IT-94-1-T, paras 22, 25. See N. Affolder, "The Anonymous Witness and The Sources of International Procedural Law" (1998) 19 *Mich. J.I.L.* 445; M. Leigh, "Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused" (1996) 90 *A.J.I.L.* 235; C. Chinkin, "Due Process and Witness Anonymity" (1997) 91 *A.J.I.L.* 75; M. Leigh, "Witness Anonymity is Inconsistent With Due Process" (1997) 91 *A.J.I.L.* 80; The Appeals Chamber in *Blaskic* castigated the Trial Chamber for invoking a (US inspired) "ripeness" doctrine, as "domestic judicial views or approaches should be handled with the greatest caution at the international level, lest one should fail to make due allowance for the unique characteristics of international criminal proceedings". *Blaskic*, *ibid.* para 23.; H. Ascensio, "The Rules of Procedure and Evidence of the ICTY" (1996) 9 *L.J.I.L.* 467; J. R.W.D. Jones *The Practice of the ICTY & ICTR* (New York: Transnational, 1998) *passim*; P. Dolenc, "A Slovenian Perspective



sentencing the Tribunal is also not subject to national laws,<sup>229</sup> it is meant to have recourse to the sentencing practice of former Yugoslavia when determining penalties,<sup>230</sup> but it is clear that although “this practice can be used for guidance... it is not binding.”<sup>231</sup> There is no doubt that the law applied here is international law.

## ICTR

To a large extent, the legal position in the ICTR is the same as for the ICTY. In terms of applicable law, the ICTR, like the ICTY, has jurisdiction over genocide and crimes against humanity.<sup>232</sup> In relation to war crimes, the Secretary-General noted that they included violations of Additional Protocol II (which is not generally considered customary) and Common Article 3, which was not universally accepted as giving criminal liability at the time.<sup>233</sup> The justification for the inclusion of these was the fact that Rwanda was a party to APII and the Geneva Conventions. Therefore, again, what is being applied is international law, not any provision of Rwandan law, or the national law of any other State.<sup>234</sup> This is also clear from ICTR judgments.<sup>235</sup> Again, for procedural law, the ICTR is not bound by national procedures or rules of procedure.<sup>236</sup> For sentencing, the ICTR is

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on the Statute and Rules of the International Tribunal for the Former Yugoslavia” in Clark & Sann, *supra* n.123, 237; D.D. Ntanda-Nsereko, “Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia” in Clark & Sann, *ibid.* 293; V.M. Creta, “The Search for Justice in The Former Yugoslavia and Beyond: Analyzing the Rights of the Accused under the Statute and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia” (1998) 20 *Houston J.I.L.* 381; The inapplicability of national law raises questions about the utility of evaluating the procedures in the light of national laws. For examples of this type of evaluation see M.P. Scharf, “Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal” (1998) 30 *N.Y.U.J.I.L. & Politics* 167; S. Yee, “The Erdemovic Sentencing Judgment: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia” (1997) 26 *Ga.J.I. & C.L.* 263.

<sup>229</sup> ICTY Statute, Article 24, Rule of Procedure 101.

<sup>230</sup> *Ibid.* see also Secretary-General’s Report, *supra* n 118, para 111.

<sup>231</sup> *Prosecutor v Erdemovic* Sentencing Judgment, 29 November 1996, IT-96-22-T, para 39. *Ibid.* they also note that there are legal obstacles to application of Yugoslav law. Not least the death penalty provided for in former Yugoslav law. For an attempt to create guidelines with reference to national law, see D.B. Pickard, “Proposed Sentencing Guidelines for the International Criminal Court” (1997) 20 *L.L.A.I. & C.L.J.* 123.

<sup>232</sup> ICTR Statute, Article 2, Article 3.

<sup>233</sup> Secretary-General’s report, *supra* n.161, para 12. See Akhavan, *supra* n.156, p.504; Johnson, *supra* n.160, pp.220-222.

<sup>234</sup> The case for this is bolstered by the Chinese assertion at the adoption of 955 that it was the use of universal jurisdiction over international crimes S/PV. 3453, p.7.

<sup>235</sup> *Prosecutor v Akayesu*, Judgement, 2 September 1998, ICTR-96-4-T, section 6 See D.M. Amann, “Prosecutor v Akayesu” (1999) 93 *A.J.I.L.* 195.

<sup>236</sup> Article (14) gives the ICTR the power to promulgate Rules of Procedure and evidence, based on the ICTY rules. By Rule of Procedure (ICTR/3/Rev.4) 89 the ICTR is not subject to national rules of evidence, see *Prosecutor v Kanyabashi*, *supra* n.164, para 42.

not to rely on Rwandan law, but may have recourse to national practice.<sup>237</sup> This was highly controversial in the drafting of the ICTR Statute, as Rwanda wanted the ICTR to follow its lead and use the death penalty. This proposal was rejected, and this rejection was one of the reasons the Rwandans voted against the statute.<sup>238</sup> As with the ICTY, the conclusion is inescapable that it is international law which is applicable to the ICTR.

## ICC

In the earlier drafts in the ILC, there were references to national law being applicable to the ICC.<sup>239</sup> There was still some disagreement in the PREPCOM, when some said that certain States' national laws were relevant.<sup>240</sup> This was rejected. The Rome Statute contains a provision relating to the applicable law inspired by that in the Statute of the ICJ.<sup>241</sup> The ICC is to apply its own Statute, elements of crimes and Rules of Procedure and Evidence. The applicable substantive law is international criminal law, as defined in the Statute.<sup>242</sup> In addition, it may apply relevant applicable treaties and rules of international law, then, general principles of law drawn from national laws, including, as appropriate, those States with jurisdiction.<sup>243</sup> These are sources of international law, the last not being national law *per se*, but general principles drawn from national laws. For procedural law, Article 23 also shows that the procedure is not to be a national one.<sup>244</sup> For sentencing too, the Rome ICC is not bound by national laws. Again the death penalty

<sup>237</sup> Article 23, Rule of Procedure 101(B)(iii). See F. Harhoff, "Consonance or Rivalry: Calibrating the Efforts to Prosecute War Crimes in National and International Tribunals" (1997) 7 *Duke J.C. & I.L.* 571, p.581.

<sup>238</sup> *Ibid.* S/PV. 3453, p.11. See M.M Wang, "The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact" (1995) 27 *C.H.R.L.R.* 177, p.202; D. Schraga & R. Zacklin, "The International Criminal Tribunal for Rwanda" (1996) 7 *E.J.I.L.* 502, p.511.

<sup>239</sup> ILC 1993 Draft *supra* n.185, Article 28.

<sup>240</sup> Hall (6<sup>th</sup> Session), *supra* n.189 p.552. For proposals made at Rome see, A/CONF.183/C.1/L.53., A/CONF.183/WGAL/L.1, A/CONF.183/WGGP/L.1-12. China attempted to get some reference to national laws in for admissibility claims in A/CONF.183/C.1/L.15. It was rejected.

<sup>241</sup> Rome Statute, Article 21. M. Arsanjani, *supra* n.190, p.28.

<sup>242</sup> These are, broadly, Genocide, Crimes Against Humanity, War Crimes and Aggression (Article 5) Detailed consideration is left to Chapter 5. The nature of the court makes it clear that these are jurisdictional provisions, rather than creative of international crimes, the Original ILC draft, from which the Rome Statute grew was intended to be an "adjectival" instrument (describing, rather than creating crimes) (See Crawford, *supra* n.187, p.411) The general decision in Rome was that the Court should stick to customary law crimes. The extent to which this was achieved is discussed in Chapter 3.

<sup>243</sup> The Tribunal may also draw upon its own jurisprudence, (Article 23).

<sup>244</sup> For detail on these matters see the Rules of Procedure and Evidence, finalised at the June 2000 PREPCOM.



was excluded,<sup>245</sup> showing the independence from the national law of States, many of whom still retain the death penalty. It seems very clear that the ICC can only apply international law.

## CONCLUDING REMARKS

As can be seen, of the five courts under consideration, their bases, although in international law, have often been controversial. The main exception to this has been the Rome Statute, although arguments have raged about whether or not its jurisdictional provisions are in excess of what international law will allow; this debate will be returned to in Part 3. It is this international basis which distinguishes them from courts like the Control Council Law 10 courts in post-WWII Germany. The various courts and tribunals discussed do not have a consistent basis or history, therefore it would be inaccurate to presume that their operation, and the critiques of them will be the same. That said, there are similarities in the identities of the creators of the two IMTs, and an identity in the creators of the two UN tribunals (although not their authors). Standing out is the ICC, despite being drafted by a conference under UN auspices, it will not be a UN body. The ICC will be brought into a relationship with the UN, but will not be, strictly speaking a UN body. The genesis of the courts has had an effect not only on the law (which will be investigated in Part 3), but also on their operations and their powers. It is to the latter aspect which Chapter 2 will now turn.

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<sup>245</sup> Article 77 & Article 80.

# PART 2: THE STRUCTURE OF INTERNATIONAL CRIMINAL LAW ENFORCEMENT

# CHAPTER 2: THE POWERS AND JURISDICTION OF THE INTERNATIONAL CRIMINAL COURTS

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## INTRODUCTION

In this chapter, the powers of the international criminal courts to address binding orders to States and individuals will be introduced, along with the powers of those courts to enforce those orders against recalcitrant States and individuals. The discussion here will relate primarily to the nature of the obligations. Details on particular issues will be left until the relevant sections in the later chapters of the thesis. From here, focus will move, in a short section, to the jurisdictional competence, *rationae personae* of the international criminal tribunals. The reason for this discussion is that it is impossible to understand the effects the various international criminal tribunals have had on the ways in which the international regime for the prosecution of international crimes operates without it.

## NUREMBERG IMT

The position of the Nuremberg IMT is interesting, not least because some of the staff (the prosecution) were, of course subject to their own States' authority, in addition to the close relationship between the Nuremberg IMT and Allied control of Germany.

Looking at the London Charter, there are some provisions which would seem to give



the prosecutors the authority to bind the Control Council (thus the States comprising it) and the nineteen adherents to the London Charter.<sup>1</sup> The first of these is Article 3, which states “[e]ach of the signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the IMT.”<sup>2</sup> The wide obligation this would appear to impose is greatly limited by Article 15 which provides that “no witness or defendant detained by any signatory shall be taken out of the possession of that signatory without its assent.” Equally, the implementing decision of the Control Council decided that “each Zone commander will deliver such persons who are within his zone to that committee [of prosecutors] upon request and will make witnesses and evidence available to it”.<sup>3</sup> On a practical level, of course, the prosecutors were under national orders, and decisions on who to indict were heavily influenced by the home States, so this obligation was weak.

The Nuremberg IMT itself had some powers by virtue of Article 17 of the London Charter. The tribunal had the “power to (a) summon witnesses to the trial and require their attendance and testimony (b) to require the production of documents and other evidentiary material”. This would appear to be quite a strong obligation to cooperate, in that the Nuremberg IMT could require individuals to attend. Still, this would again seem to be weakened by Article 15.

This does not apply to a different aspect of the Nuremberg IMT’s ability to bind the signatory States. The first of these is Article 10, which provides that the Nuremberg IMT’s determinations on the criminality of certain organisations were final “and shall not be questioned”.<sup>4</sup> In the US Zone, by Article X of Military Government Ordinance 7, the determinations of the IMT on various facts were considered binding.<sup>5</sup> The other States

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<sup>1</sup> 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Power and Charter of the International Military Tribunal, 82 UNTS 279.

<sup>2</sup> If not detained by them, the Signatory States are merely to use their “best endeavours” to obtain custody.

<sup>3</sup> Control Council Law No. 10, Article III(3). This also gave the committee of prosecutors the right to veto the removal of a person they required to outside Germany.

<sup>4</sup> E. Schwelb, “Crimes Against Humanity” (1946) 23 *B.Y.B.I.L.* 178, p.208.

<sup>5</sup> Military Government-Germany, United States Zone Ordinance No 7, 18 October 1946.

did not go so far, but generally respected the findings.<sup>6</sup> As a matter of formal legal obligation though, the only part of the judgment (other than the individual verdicts, and to the extent the judgment reflected customary international law) which bound the Control Council was its determinations on criminal organisations.

### TOKYO IMT

The position of the Tokyo IMT is a little more difficult to ascertain, there is little more to go on than the Charter itself. In many ways the Charter was a retread of the provisions of the Nuremberg Charter. Article 11 gave the Tokyo IMT the power to summon witnesses, to require their attendance and to require production of documents and other evidence. Article 9 gave the defence the right to ask the tribunal to order the production of witnesses and documents. This article also provides the obligations of the occupation authorities who were to “give... such aid in obtaining the production of the evidence as the circumstances require”.<sup>7</sup> This gave them the right to send binding orders within Japan.

The real problem with both the Nuremberg and Tokyo IMTs is that, in practice, while their basis was international, they were functionally almost integrated into the occupation regimes. This puts them in a *sui generis* category for requiring State co-operation. As the ICTY put it in its first *Annual Report* “it is well known that the Allied powers that set up the international tribunals at Nürnberg and Tokyo wielded full authority and control over the territory of Germany and Japan respectively, and, in addition, had already apprehended the defendants when the trials commenced.

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<sup>6</sup> A. Basak, “The Influence of the Nuremberg Judgment on the Practice of the Allied Courts in Germany” (1977-8) 9 *P.Y.B.I.L.* 161.

<sup>7</sup> Special proclamation; Establishment of an International Military Tribunal for the Far East, 19 January 1946, T.I.A.S. No 1589 at p.3. 14 *US Dept. of State Bulletin* p. 461. A Separate issue of the utility of the right is shown by Rule of Procedure 5, by which all requests had to go through the prosecutor’s office, which thus gave them advance warning of the defence case, and the right to object to the request. This put the defence at severe disadvantage.



Consequently those Tribunals did not need co-operation of the defendant's national authorities or those of other countries for the prosecutor's investigations".<sup>8</sup>

As a result of this, the two IMTs did have some power in relation to requiring the support of the occupation regimes, however these were the same regimes that they were representing in many respects. Therefore their State co-operation regime was far more like a national court in relation to national authorities, and does not represent a model suitable for the modern international criminal law system. Therefore, when we move onto discussion of the ways in which international criminal courts act in an integrated regime of prosecution for international crimes, there will be little debate on these courts.

#### ICTY AND ICTR

The nature of the obligations imposed on States by the Security Council is remarkable. Not only do the UN Tribunal's judgments directly bind the defendants,<sup>9</sup> but also the tribunals have the ability to bind all States of the United Nations, giving them an almost universal bailiwick to issue orders.

There are various ways in which the Tribunal can impose obligations on States. Nagan has said "securing an organised international criminal law prospect would seem to require intergovernmental organizations (the United Nations, or within that organisation, the Security Council) to co-opt or preempt a significant portion of that power presently allocated to States themselves".<sup>10</sup> This is precisely what the Security Council did. As the ICTY said in the *Blaskic Case*: "the relation between national courts of different States is

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<sup>8</sup> 1<sup>st</sup> Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law on the Territory of Former Yugoslavia From 1<sup>st</sup> January 1991, UN Doc, A/49/342 para 84

<sup>9</sup> This includes the Tribunal's judgments on contempt of false witness under oath, which are issued pursuant to (Joint) Rules of Procedure (Rule 77 & 91). For comment, see J.J.E. Schutte, "Legal and Practical Implications, From the Perspective of the Host Country, Relating to the Establishment of the ICTY" in R. Clark & M. Sann, *The Prosecution of International Crimes* (New Brunswick: Transaction, 1995) 207, pp.217-9. The Tribunal's judicial pronouncements bind the Security Council, D. Sarooshi, "The Powers of the United Nations International Criminal Tribunals" (1998) 2 *Max Planck Y.B.U.N.L.* 141, p.145.

<sup>10</sup> W. Nagan, "International Criminal Law and the Ad Hoc Tribunal for Former Yugoslavia" (1995) 6 *Duke J.C & I.L.* 127, p.133.



‘horizontal’ in nature. In 1993 the Security Council for the first time established an international criminal court with jurisdiction over individuals living in sovereign States... and, in addition, conferred on the International Tribunal the power to address to States binding orders concerning a broad variety of judicial matters... . Clearly a ‘vertical’ relationship was thus established, at least as far as the judicial and injunctory powers of the International Tribunal are concerned”.<sup>11</sup>

## PRIMACY

The first manifestation of the “vertical” relationship created is the “high water mark” of the priority of international courts,<sup>12</sup> primacy.<sup>13</sup> Article 9(1) ICTY Statute (8(1) ICTR Statute) accepts that concurrent jurisdiction exists between national and the UN tribunals, then Article 9(2) ICTY Statute (8(2) ICTR Statute) gives the right to the UN tribunals to “formally request national courts to defer to the competence of the International Tribunal”. It is clear that the “request” is binding.<sup>14</sup> This places the UN tribunals in a hierarchically superior position to national jurisdictions, as they may demand they defer their competence to them. As Judge Sidhwa put it: “the rule obliges States to accede to and accept requests for deferral on the ground of suspension of their sovereign rights to try the accused themselves”.<sup>15</sup>

For the ICTR, this process is a one way street. It is clear that for indictees in custody at the ICTR who have made their initial appearance, transfer to a requesting State would

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<sup>11</sup> *Prosecutor v Blaskic*, Decision on the Request of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, IT-95-14-108bis, para 46.

<sup>12</sup> B. Brown, “Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals (1998) 23 *Yale J.I.L.* 383, p.385.

<sup>13</sup> On which see, Brown, *ibid.*; J. Alvarez, “Nuremberg Revisited: The Tadic Case” (1996) 7 *E.J.I.L.* 245, pp.252, 256; V. Morris & M.P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for Former Yugoslavia* (New York: Transnational, 1995) pp.125-132; V. Morris & M.P. Scharf, *The International Criminal Tribunal for Rwanda* (New York: Transnational, 1998) pp.312-325.

<sup>14</sup> See, for example, *Prosecutor v Tadic*, Decision on the Request of the Prosecutor for a Formal Request for Deferral, 8 November 1994, IT-94-1; *Prosecutor v Tadic*, Decision on the Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72, Separate Opinion of Judge Sidhwa, para 83. L. Vierucci, “The First Steps of the International Criminal Tribunal for Yugoslavia” (1995) 6 *E.J.I.L.* 134, pp.136-142.

<sup>15</sup> *Tadic*, *ibid.*

not be possible. In the case deciding this point, *Prosecutor v Ntuyuhaga*<sup>16</sup> Belgium had indicated its willingness to try the defendant.<sup>17</sup> The Prosecutor agreed that the most sensible course of action was that Belgium prosecute him. Thus she sought to withdraw the indictment she had over him in the ICTR, and to transfer him to Belgium to stand trial there. The ICTR, in a controversial decision, which has done little for relations between itself and Belgium determined that although it could (and did) withdraw the indictment, at that point its jurisdiction over the (ex)indictee ended, and he had to be released.<sup>18</sup> The ICTR rejected Belgium's arguments that the ICTR could transfer him directly despite the absence of an express provision in the Statute or Rules for this. The decision is not unassailable. The Security Council could not have contemplated that co-operation between States and the tribunal should only be one way, when their jurisdictions, although not equal, are concurrent.<sup>19</sup>

The ICTY has taken a slightly more progressive approach where the arresting State wishes to try the suspect, and the Trial Chamber considers it appropriate. By virtue of Rule of Procedure 11*bis*, a Trial Chamber can suspend the ICTY indictment against the accused, and order transfer to the State who originally arrested the suspect and transferred him.<sup>20</sup> This recognises the concurrence of jurisdictions, but also the primacy of the ICTY. The ICTY retains the right to decide if it is appropriate and the relevant Trial Chamber can, at any time up to conviction or acquittal of the accused, order return to the ICTY to stand trial. This could be extended to other States who are willing to try the defendant.

In relation to which States the two UN tribunals may ask, the ICTR Statute is clear, they may ask any UN member State (or State who has specifically accepted the

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<sup>16</sup> *Prosecutor v Ntuyuhaga*, Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 March 1999, ICTR-98-40-T.

<sup>17</sup> The reason for this was that the crime with which he was charged before the ICTR was the killing of ten Belgian peacekeepers.

<sup>18</sup> *Ntuyuhaga*, *supra* n.16.

<sup>19</sup> See *Amicus Curiae* Arguments, reported in "A Sign of the Times" (1999) 58 *Ubutabera* 8.

<sup>20</sup> ICTY Rules of Procedure and Evidence, IT/32/Rev.17, Rule 11*bis*(A).



obligation) to defer to them.<sup>21</sup> With respect to the ICTY the position was a little confused, Article 9 of the ICTY Statute merely mentioning that the ICTY can ask “national courts” to defer. Despite there being no express limitation in this language,<sup>22</sup> certain members of the Security Council gave interpretative statements that limited the obligation, in particular, by saying that the obligation to defer was limited to the States of Former Yugoslavia alone.<sup>23</sup> That said, there is doubt whether these should be taken as authoritative interpretations for all purposes.<sup>24</sup> The statements themselves were not identical, nor did they agree with each other here,<sup>25</sup> and seem to contradict the clear wording of the Statute. The approach taken by the ICTY in the Rules of Procedure show they considered the duty to be incumbent on all States,<sup>26</sup> and the duty extending to all States was affirmed by the ICTY in the *Tadic* Case<sup>27</sup> in which Germany also accepted that it was under a duty to defer.<sup>28</sup> Thus the duty extends to all States who are UN members or that have accepted the obligation (in particular Switzerland). It represents a large inroad into State freedom to deal with people in their territory.

There are limits to the right. After all, the UN Tribunals have concurrent jurisdiction, and they are not intended to prevent national jurisdictions prosecuting offences from the Yugoslav and Rwandan conflicts. Their right to demand deferral is limited to where it is justified.<sup>29</sup> The situations when deferral is justified are given in Rule 9 of the Rules of Procedure. They are when the act is being charged as an ordinary (not an international)

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<sup>21</sup> Article 8, see *Ntuyuhaga*, *supra* n.16, “the primacy recognised by the statute is clear inasmuch as the Tribunal may request any national jurisdiction to defer investigation or ongoing proceedings”.

<sup>22</sup> Brown, *supra* n.12 p.407.

<sup>23</sup> See S/PV.3217, UK p.11, who claimed primacy would only be exceptionally invoked over non ex Yugoslav States. Russia, p.28. Russia went the furthest, denying the automatic binding nature of the orders, none of the others adopted this, nor have the Tribunals.

<sup>24</sup> J.O'Brien, “The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia” (1993) 77 *A.J.I.L.* 639, p.657-8 claims that the Tribunal should consider them an integral part of the Statute as they must be presumed to have been agreed to by the Council. M.P. Scharf, “Comments” (1994) 88 *Proc A.S.I.L.* 251 p.252 explains that no representative had been empowered to respond to them, as the statements were not expected at the meeting. *Prosecutor v Tadic*, Judgment, 15 July 1999, IT-94-1-A, paras 298-304, found that for determining if crimes against humanity required a discriminatory *animus*, the statements made in the Security Council were not to be considered controlling.

<sup>25</sup> Brown, *supra* n.16, pp.400-402.

<sup>26</sup> *Ibid.* See (Joint) Rules of procedure 9-10.

<sup>27</sup> *Supra* n.14.

<sup>28</sup> *Ibid.* Transcript p. 30-31. See Vierucci, *supra* n.14, pp.140-142.

<sup>29</sup> Morris & Scharf, *supra* n.13, pp.315-6.



offence,<sup>30</sup> where the proceedings are not fair or impartial, or “what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal”.<sup>31</sup> The first two may be quite narrow, focusing on the national proceedings, but the last is a very broad provision, effectively allowing the tribunal (on the request of the prosecutor) to demand transfer whenever it wants to.<sup>32</sup>

Normally, for deferral proceedings the government to whom the order is<sup>33</sup> to be made is heard as an *amicus curiae*, but this is not necessary, nor is the consent of the government to the transfer.<sup>34</sup> As can be seen, this is a very wide inroad into State sovereignty, given that the UN tribunals can take any case they wish to try away from almost any national (or sub-national) authority,<sup>35</sup> at any stage of the national proceedings. As Morris and Scharf exclaim, this is both “extraordinary and unprecedented”.<sup>36</sup>

The UN Tribunals’ powers extend further than this, even to the situation where a national court has pronounced judgment. Once a defendant has been tried by one of the tribunals, national courts are prevented from retrying that person for the same crimes.<sup>37</sup>

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<sup>30</sup> For criticism of this in the context of Article 10(2) see H. Levie, “The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look to the Future” (1995) 21 *Syracuse J of I.L. & Commerce* 1, p.15.

<sup>31</sup> Joint Rule 9(i-iii).

<sup>32</sup> In *Tadic* deferral, *supra* n.14, para 11; The ICTY said if there was an investigation by the Prosecutor, and the issue in the national proceedings “is closely related to, or may have implication and common significant factual or legal questions, for the Prosecutor”. They accepted a declaration by the OTP that this was the case as enough, deciding that as other cases were related to *Tadic*’s they should order deferral. So far, all orders for deferral have been granted on the basis of Rule 9(iii), although the Prosecutor has occasionally asked on 9(ii) grounds. See *Vukovar Hospital Case* CC/PIU/374-E.

<sup>33</sup> The governments were heard, for example, in the *Karadzic & Mladic* and *Tadic* cases, see F. Patel-King & A-M. la Rosa, “The Jurisprudence of the Yugoslavia Tribunal 1994-1996” (1997) 8 *E.J.I.L.* 123, pp.127-8.

<sup>34</sup> No comment was made by the FRY in the *Erdenovic* deferral proceedings, and it opposed deferral in the *Vukovar Hospital Case*. Orders were made in each case. The ICTR has heard governments in the *Prosecutor v Musema* Decision of the Trial Chamber in the Application by the Prosecutor for a Formal Request for Deferral by Switzerland in the Matter of Alfred Musema, 12 March 1996, ICTR-96-5-D; *RTLM* Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral by the Kingdom of Belgium and in the matter of Radio Television Libre des Mille Collines Sarl, 12 March 1996, ICTR-96-6-D *Prosecutor v Bagosora*, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral by the Kingdom of Belgium and in the matter of Theoneste Bagosora, 17 May 1996, ICTR-96-7-D. See Morris & Scharf, *supra* n.13, pp.322-5.

<sup>35</sup> Rule 9 was amended in 1995 to give the ICTY the right to issue orders to sub-State entities to defer, this was introduced to deal with the post-Dayton position in Yugoslavia.

<sup>36</sup> Morris & Scharf, *supra* n.13, p.126.

<sup>37</sup> Article 10(1) ICTY Statute, Article 9(1) ICTR Statute, Joint Rule of Procedure 13; *Prosecutor v Tadic*, Decision of the Defence Motion on the Principle of *Non Bis in Idem* 14 November 1995, IT-94-1-T, para 13. See Patel-King & Rosa, *supra* n.33, p.150; J. Pejic & L. Egan, “Prosecuting War Crimes in the former Yugoslavia: the Two Tiers and the Linkage” (1995) 1 *E.E.H.R.R.* 11, p.18.

The converse does not always apply. Article 10 ICTY Statute (Article 9 ICTR Statute) gives the tribunals the “unprecedented power to render a national judicial process invalid”.<sup>38</sup> Obviously, as this is a matter of some sensitivity (which is the reason extradition treaties often have the rule of non-inquiry), and as the principle of *non bis in idem* is an important human right of the defendant, the circumstances for this are limited. The UN tribunals may only retry a person if the crime was characterised as an ordinary crime, or the proceedings were not fair or impartial, or were designed to shield the accused from the tribunal’s jurisdiction.<sup>39</sup> Here a clear hierarchy is put in place between national jurisdictions and the UN tribunals, with the authority to make these decisions being placed in the international tribunals. National courts are not permitted to question the UN tribunal’s proceedings.

## ORDERS

The second manifestation of the superiority of the UN tribunals over national jurisdictions is based on Article 29 of the ICTY Statute (Article 28 ICTR Statute). This states that “1. States shall cooperate with the International Tribunal... 2 States shall comply without undue delay with an request for assistance or an order issued by a Trial Chamber... .” For both tribunals, the obligation is bolstered by the Security Council Resolutions which established them. Resolutions 827 and 955 declare that “all States shall cooperate fully with ... [the tribunal]... all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the statute including the obligations of States to comply with requests for assistance or orders issued

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<sup>38</sup> K.A. Hochkammer, “The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics and International Law” (1994) 28 *Vanderbilt J.T.L.* 119, p.153.

<sup>39</sup> Article 10(2) ICTY Statute, Article 9(2) ICTR Statute, See Morris & Scharf (ICTY) *supra* n.13, pp.134-135; Morris & Scharf, (ICTR) *supra* n.13, p.317; Levie, *supra* n.30, p.15; A.P. Rubin, “An International Tribunal for Former Yugoslavia” (1994) 6 *Pace I.L.R.* 7, p.12.



by a trial chamber”.<sup>40</sup> As can be seen, the basis of this obligation is a Chapter VII resolution of the Security Council, gaining its force from Article 25 of the UN Charter.<sup>41</sup> There is some question about the precise nature of the obligation: the Secretary General has claimed that every order by the tribunals was an enforcement measure.<sup>42</sup> It is doubtful that the Security Council could delegate the power to decide on further enforcement measures, and it is better to see the power being merely the issuance of orders, which are binding on States as a result of the Chapter VII resolutions.<sup>43</sup> This is the position taken by the ICTY,<sup>44</sup> ICTR,<sup>45</sup> and later on, the Secretary-General.<sup>46</sup>

The nature of the obligation being based in Chapter VII of the UN Charter leads to certain important features. First, all UN member States are under an obligation to comply with the requests, irrespective of the whether or not they were in the Security Council and voted for the tribunals. In *Blaskic* the ICTY described the obligation as novel and unique, the “obligation set-out in the clearest of terms-in Article 29 is an obligation on every member State of the United Nations *vis-à-vis* all other member States. Thus it is an *erga omnes* obligation ... [and every UN member State]... has a legal interest in the fulfilment of the obligation”.<sup>47</sup>

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<sup>40</sup> This creates not only an obligation to comply with the orders, but a separate duty to introduce implementing legislation to ensure they may comply with any orders. See *Prosecutor v Blaskic*, Decision of the President on the Defence Motion Filed Pursuant to Rule 64, 2 April 1996, IT-95-14-T, para 7. “since 1993 all States have been under an unquestionable obligation to enact implementing legislation necessary to permit them to execute warrants and requests of the Tribunal... this is not a generic obligation, but a very specific one... an “obligation of conduct”... or obligation of means, namely, an obligation requiring States to perform a specifically determined action”. The national action on this obligation is surveyed in chapter 3, pp.131-134.

<sup>41</sup> See S/PV. 3453, pp. 3,6. Morris & Scharf, (ICTR) *supra* n.13, p.638, C. Greenwood, The Development of International Humanitarian Law by the International Criminal Tribunal for Former Yugoslavia” (1998) 2 *Max Planck Y.B.U.N.L.* 97, p.106.

<sup>42</sup> Report of the Secretary General Pursuant to paragraph 5 of Security Council Resolution 808. UN Doc. S/25704, para 23.

<sup>43</sup> K. Gallant, “Securing the Presence of Defendants Before the International Tribunal for Former Yugoslavia; Breaking with extradition” in Clark & Sann, *supra* n.9, 343, p.351.

<sup>44</sup> See *Prosecutor v Mrksic, Radic, Sljivancanin & Dokmanovic*, Decision on the Motion for Release by the Accused Slavko Dokmanovic, 22 October 1997, IT-95-13a-PT, para 35.

<sup>45</sup> *Prosecutor v Kanyabashi*, Decision on the Defence Motion on Jurisdiction, 18 June 1997, ICTR-96-15-T, para 34.

<sup>46</sup> Letter from the Secretary General to FRY, 24 April 1994.

<sup>47</sup> *Blaskic*, *supra* n.11, para 26. In this, the ICTY overstates the obligation as *erga omnes*; it is actually to all other members of the UN. Similarly, C.C. Joyner, “Strengthening Enforcement of International Humanitarian Law: Reflections on the International Criminal Tribunal for Former Yugoslavia” (1995) 6 *Duke J.C. & I.L.* 79 p.91 overstates the position claiming orders are equivalent to *jus cogens* as they overcome other obligations. The real basis for this is Article 103.



This compliance trumps other international legal obligations, by virtue of Article 103 of the UN Charter. Very importantly, “there are no specified grounds on which a State may refuse to comply with an order or request from the International Tribunal”.<sup>48</sup> National law impediments are simply not applicable. Joyner accurately comments: “compliance by States with any requests from the Tribunal for judicial assistance is obligatory and not subject to interpretation”.<sup>49</sup>

The unconditional nature of the obligation is particularly important for two matters: obtaining defendants despite the normal restrictions on extradition, and gaining possession over documents subject to national security restrictions. For surrender, Rule of Procedure 55 gives the tribunal the right to demand transfer, and 58 leaves no doubt about the obligation. “The obligation in Article 29 of the Statute shall prevail over any legal impediment to surrender or transfer of the accused or of a witness to the tribunal which may exist under the national law or extradition treaties of the State concerned.” With respect to national security protected documents, Rule of Procedure 54 allows the tribunals to demand documents. Although customary international law protects these from disclosure,<sup>50</sup> the ICTY asserted the right to these documents in the *Blaskic* case, on the ground that they would be required for trial and there was no specific limit in Article 29 on the obligation.<sup>51</sup> Although the ICTY accepted that some measures for confidentiality would need to be taken, the decision on whether the documents had to be transferred lay, at all times, with the tribunal.<sup>52</sup>

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<sup>48</sup> *Blaskic*, *supra* n.11, Trial Chamber, para 77, Appeals Chamber, para 63.

<sup>49</sup> *Supra* n.47, p.89, See also R. Kushen & Harris, “Surrender by the United States to the International Tribunals for former Yugoslavia and Rwanda” (1996) 90 *A.J.I.L.* 510, p.511. This is the position taken by the UN, Letter from Hans Corell to Biljana Blavsic, 21 January 1997, “it is the position of the United Nations that unconditional co-operation with the International Tribunal is imperative.”

<sup>50</sup> *Blaskic supra* n.11, para 29.

<sup>51</sup> *Ibid.* paras 62-68. See generally, H. Strydom, “The Legal Authority of the International Criminal Tribunal for ex-Yugoslavia to Order the Disclosure of Evidence” (1997) 22 *S.A.Y.B.I.L.* 76, R. Wedgwood, “International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaskic” (1998) 11 *L.J.I.L.* 635; J. Katz Cogan, “The Problem of Obtaining Evidence for International Criminal Courts” (2000) 22 *H.R.Q.* 404, p.p.415-423; A useful comparison of the UN tribunals and the ICC is T. Henquet, “Mandatory Compliance Powers *vis-à-vis* States by the *ad hoc* Tribunals and the International Criminal Court: A Comparative Analysis” (1999) 12 *L.J.I.L.* 969.

<sup>52</sup> *Ibid.* paras. 67-8. Wedgwood is mildly critical of this, for rejecting legitimate State interests, *ibid.* pp.644-5.

The first type of order the tribunals are mandated to issue are arrest warrants and transfer orders. These are sent to the authorities in the State where the accused or witness was known to reside, who are under a duty to “act promptly and with all due diligence to ensure proper and effective execution thereof”.<sup>53</sup>

The tribunals have a very broad competence to issue orders. Rule 54 states “[a]t the request of either party, or *proprio motu*, a judge or Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or for the conduct of the trial”. This is an open-ended provision granting very wide discretion to the tribunals to require cooperation, which has been used for orders on various matters.<sup>54</sup>

This does not mean that there are no limits to the tribunals’ authority to issue orders. One particularly important limit is that they are not permitted to issue subpoenas or binding orders to State officials in relation to their official duties. The ICTY decided that this was the position in *Blaskic* because such persons are acting for the State, who can choose how to implement its obligations to the tribunals.<sup>55</sup> This includes soldiers in their national forces, but not those in international forces under UN mandate, or those ordered in their private capacity.<sup>56</sup> The importance of this is in that it prevents the tribunals from compelling individuals to account for State actions even where they are at a high level, thus making the decisions.

An interesting issue arises with respect to the orders of the tribunal relating to defendants and witnesses. The power to pierce the State veil and deal directly with

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<sup>53</sup> Rule of Procedure 56. See also Rules 55 & 59*bis*.

<sup>54</sup> See for example, *Prosecutor v Krsnanovic & Djukic*, Order for Provisional Detention, IT-96-20. For criticism see P.J.I.M. de Waart, “From Kidnapped Witness to Released Accused ‘for Humanitarian Reasons’: The Case of the Late Djorde Djukic” (1996) 9 *L.J.I.L.* 453. *Prosecutor v Tadic*, Decision on Prosecution Motion for Protective Measures for Witnesses, 10 August 1995, IT-94-1-T, para 8, see A. Klip, “Witnesses Before the International Criminal Tribunal for Former Yugoslavia” (1996) 67 *R.I. de Dr. Penal* 267, pp.281-2, *Prosecutor v Lajic* Order for the Withdrawal of Charges Against the Person Named Goran Lajic and for his Release, 17 June 1996, IT-95-8, (See Patel-King & Rosa, *supra* n.33, pp.168-70)). In addition, Article 98 gives the Trial Chamber the power to order the presence of witnesses, and Rules 39 and 40 give the prosecutor the right to ask States for certain measures to be taken.

<sup>55</sup> *Blaskic*, *supra* n.11, para 38-44.



individuals is a very wide power, normally associated with courts considered to have supranational powers.<sup>57</sup> Obviously, all criminal courts do this to the extent that they give out sentences, but with the UN tribunals, the matter goes further. Originally, there was some doubt whether the orders of the tribunals actually bound individuals.<sup>58</sup> Since then opinion has swung to the view that Article 29 orders are directly binding upon them.<sup>59</sup> This was settled by the *Blaskic* case, where the ICTY Appeals Chamber said that, although requests would normally go through the State, where the authorities prevent the tribunal from fulfilling its mandate “the International Tribunal may enter into direct contact with an individual subject to the sovereign authority of a State. The individual, being within the ancillary (or incidental) criminal jurisdiction of the International Tribunal, is duty bound to comply with its orders, requests and summonses.”<sup>60</sup> It would thus seem that going through the State organs is a concession made by the tribunals, but not one that is necessary. This is a sign of a strong supranational streak in the tribunals.

The final aspect here, is the ability of the Prosecutor to investigate, without the consent of the State. Article 18(2) of the ICTY Statute (17(2) ICTR Statute), gives the Prosecutor the power to “question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.”<sup>61</sup> Two points need making. First, this gives the Prosecutor the right to undertake investigations, and perform official investigations on the territory of the States concerned, without the further consent, or knowledge of the State concerned. Second, the Prosecutor can ask the Trial

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<sup>56</sup> *Ibid.* para 49, see Wedgwood, *supra* n.51, p.642, 653; Greenwood, *supra* n.41, pp.108-109 Sarooshi, *supra* n.9 p.161.

<sup>57</sup> L.R. Helfer & A-M. Slaughter, “Toward a Theory of Effective Supranational Adjudication” (1997) 107 *Yale L.J.* 273, p.289.

<sup>58</sup> See Klip, *supra* n.54, pp.268-9, 275 (implying the duties apply to States alone).

<sup>59</sup> See Sarooshi, *supra* n.9, p.158; *Amicus Curiae* Brief Submitted by the Max Planck Institute for Comparative Public Law and International Law, IT-95-14-PT, para 391.

<sup>60</sup> *Blaskic*, *supra* n.11, para 55.

<sup>61</sup> See generally, Morris & Scharf, (ICTY), *supra* n.13, pp.192-194; Morris & Scharf, (ICTR) *supra* n.13, pp.452-4.



Chamber to make other demands for help.<sup>62</sup> These are very wide powers, giving the prosecutor the right to certain police functions on the territory of a sovereign State.<sup>63</sup>

## ICC

The relationship between States, their courts and the ICC will be very different to that existing between the UN tribunals and those same State actors. Of course, one of the most important issues is that as a treaty-based court, the Rome Statute does not (and cannot) impose duties on non-parties.<sup>64</sup> Thus, unless the Statute becomes as widely ratified as the UN Charter (or the Security Council imposes a duty),<sup>65</sup> the number of States subject to duties under the Statute will be smaller than that under the UN tribunals' Statutes.

While the UN tribunals relationship to national jurisdictions is defined by the term primacy, the ICC's relationship to them is one of "complementarity."<sup>66</sup> As Arsanjani explains, this means that "[t]he ICC is not intended to replace national courts, but operates only when they don't".<sup>67</sup> This was settled early on in the ILC Drafts.<sup>68</sup> The reason for this is that criminal law is traditionally seen as a central aspect of sovereignty,

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<sup>62</sup> Joint Rule of Procedure 39.

<sup>63</sup> See, for example, A. Bodley, "Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia" (1999) 31 *N.Y.U.J.I.L. & Politics* 417, p.417.

<sup>64</sup> 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Article 34, for a recent discussion of Article 34 see A. Aust, *Modern Treaty Law and Practice* (Cambridge: CUP, 2000) Ch 14.

<sup>65</sup> If or when the Security Council were to pass a situation to the ICC under Article 13(b) of the Rome Statute, there is nothing stopping it including, in the resolution, a Chapter VII duty to comply with ICC orders on States.

<sup>66</sup> I. Tallgren, "Completing the International Criminal Order: The Rhetoric of International Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court" (1998) 67 *Nordic J.I.L.* 107, pp.110, 120 criticises the use of this term as not having a stable meaning during the drafting. The point may be well made, (the term was not of fixed meaning (see C.K. Hall, "The First two Sessions of the Preparatory Committee on the Establishment of an International Criminal Court" (1997) 91 *A.J.I.L.* 177, p.181; C.K. Hall, "The Third and Fourth Sessions of the Preparatory Committee for an International Criminal Court" (1998) 92 *A.J.I.L.* 124, p.130)) but it is a useful term now, given that the statute is complete, to describe the overall relationship. On complementarity generally, see Brown, *supra* n.12; A. Bos, "The Role of an International Criminal Court in the Light of the Principle of Complementarity", in E. Denter & N. Schriver (eds.) *Reflections on International Law from the Low Countries: Essays in Honour of Paul de Waart*, (The Hague: Kluwer, 1998) 249; J. Bleich, "Complementarity" in M.C. Bassiouni (ed.), *The International Criminal Court: Observations and Issues Before the Preparatory Committee; and Administrative and Financial Implications* 13 *Nouvelles Études Pénales*, 1997) 231; J.T. Holmes, "The Principle of Complementarity" in R.S. Lee (ed.) *The International Criminal Court* (The Hague: Kluwer, 1999) 41; S.A. Williams, "Article 17" in O. Triffterer (ed.) *Commentary on The Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999) 383.

<sup>67</sup> M.H. Arsanjani, "The Rome Statute for an International Criminal Court" (1999) 93 *A.J.I.L.* 22, pp.24-5.

over which States have an interest in retaining control.<sup>69</sup> Militating against this is an international interest in seeing international crimes properly enforced.<sup>70</sup> The result is a complex mixture of deference, and challenge to national jurisdictions. The theme of complementarity runs through the Statute, coming in at many places, but it is clear from the very start that it is a major aspect of the court. In both the preamble and Article 1 of the Rome Statute, the court is described as complementary.

Unlike the UN tribunals which effectively (other than where the principle of *non bis in idem* applies)<sup>71</sup> can take a case whenever they want, the ICC can effectively only take the case if certain States are “unwilling or unable” to investigate or prosecute the offence.<sup>72</sup> Article 17 is express about this, providing “the Court shall determine that a case is inadmissible where (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution; (b) the case has been investigated by a State which has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute...”.<sup>73</sup> To this must be added the requirement in Article 18(2) that unless the Security Council has referred the matter, the Prosecutor must inform all State parties and “those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned” that she is investigating. Pursuant to Article 18(2) such States can request the prosecutor to defer to them.<sup>74</sup> A Trial Chamber can overturn the request (on grounds not

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<sup>68</sup> J. Crawford, “The ILC Adopts a Statute for an International Criminal Court” (1995) 89 *A.J.I.L.* 404, p.410.

<sup>69</sup> Brown, *supra* n.12, p.424; J. Dugard, “Obstacles in the way of an International Criminal Court” (1997) 56 *Cambridge L.J.* 329, p.336.

<sup>70</sup> Arsanjani, *supra* n.67, p.25.

<sup>71</sup> See above, pp67-68.

<sup>72</sup> Rome Statute, Article 17(1). Article 17(2) gives guidelines in order to determine if a State is “unwilling or unable”. These are (17(2)(a)) if the investigation or prosecution is for the purposes of “shielding” the defendant from the court, (17(2)(b)), if “there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice”, or (17(2)(c)) “the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice”. On the negotiation of these, see Holmes, *supra* n.66, pp.48-55.

<sup>73</sup> Article 17 (1)(c)(d) provide for inadmissibility for *non bis in idem* or insufficient gravity of offence.

<sup>74</sup> Article 18 was a controversial addition to the Statute, supported primarily by the US, see C.K. Hall, “The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court” (1998) 92 *A.J.I.L.* 548, p.552, Arsanjani, *supra* n.67, p.27. The original proposal was A/CONF.183/C.1/L.25. On Article 18 see D.D. Ntanda Nsereko, “Article 18” in Triffterer, *supra* n.66, 395.



set out in the Statute, but probably those in Article 17) either then or later. What these provisions make clear is that certain States can, by investigating or prosecuting the matter themselves, remove the matter from the ICC, even if it wants the case.

A separate question is precisely which States may behave in this manner. The Statute merely mentions a State which “has jurisdiction” over the offence (in Article 17(1)(a)(b)) and (if not a State Party to the Statute) States which “would normally exercise jurisdiction over the crimes” (Article 18(1)). Given that under customary law universal jurisdiction exists over these offences,<sup>75</sup> this could, in theory, be any State with the domestic basis to prosecute. It is possible that the States who “would normally” exercise jurisdiction are those doing so on territoriality or nationality purposes. It is possible to imply, from Article 12’s concentration on States with those grounds of jurisdiction, that these are the States referred to in Article 17. There is much to commend this view, in that it would simplify the regime, minimise the obstacles to the ICC’s jurisdiction and would be consistent with the Statute’s reluctance to rely on universal jurisdiction. On the other hand, in Article 19(2)(b)(c) States referred to in Article 12 are dealt with separately to States “which ha[ve]” jurisdiction over a case, and the idea of the ICC is to promote the exercise of national jurisdiction. Perhaps a compromise may be reached by reference to the notion of “interested States” used by Korea in the Rome negotiations.<sup>76</sup> These were the two States referred to in Article 12 (States with territoriality or nationality jurisdiction), the custodial State and a State which would have passive personality jurisdiction. If these were involved, or seeking extradition, perhaps a useful compromise would be to accept these, but no others.

Whichever way the ICC decides to interpret the relevant phrases, it is obvious that States may prevent the ICC from taking a case by diligently proceeding with it themselves. There is one matter in which the ICC does have power over States, despite

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<sup>75</sup> See pp.94-98.

<sup>76</sup> A/CONF.183/C.1/L.7. For other documents from Rome on these matters see A/CONF.183/C.1/L.15, L.23, L.25, L.53 (Articles 15-17), L.59 (Articles 15-16), & L.60. Rev.1.



the criteria in Article 17 which allows the Court to take a case from a State being fairly limited. The decision on whether or not these criteria are fulfilled is with the Court itself, thus in certain circumstances, it may take a case over the assertion of jurisdiction by a State who is “unwilling or unable” to actively pursue the matter. It may take a case after a national court has pronounced on it, but only where the proceedings were for “shielding” purposes, or were not conducted impartially, or in a manner inconsistent with an intent to bring the person to justice.<sup>77</sup> There is no provision for retrial if the crimes was characterised as an ordinary crime, although it is possible that a conviction for a manifestly disproportionate offence could initiate the application of the second criterion. Like the UN Tribunals, trial in the ICC bars future national proceedings.<sup>78</sup>

An interesting issue is that of concurrent requests. The UN tribunals requests take precedence over all other obligations. This is not the case with the ICC’s orders for transfer which depend on various factors. Transfer orders are issued under Article 89, but it may be the case that another State has requested extradition of that person for the same conduct. Then it is relevant if the requesting State is a party to the Statute. If it is, and the court has decided admissibility and that determination included consideration of the requesting State, then the Court has priority.<sup>79</sup> If the requesting State is not party to the Statute, then the result depends on whether the State is under an international legal obligation to extradite that person to another State. If not, then the court gets priority. If the Court has already determined that the case is admissible.<sup>80</sup> If it has not, then the requested State may extradite to the requesting State.<sup>81</sup> If the court has determined admissibility, but the requested State is under an international obligation to extradite, then that State has to choose.<sup>82</sup> If any State requests the suspect’s extradition for a different

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<sup>77</sup> Article 20. See I. Tallgren, “Article 20” in Triffterer (ed.), *supra* n.66, 419.

<sup>78</sup> Article 20(1).

<sup>79</sup> Article 90(1)(2). If admissibility has not been determined when the request is made, the court is to hear the matter on an expedited basis, and the requested State is not to extradite that person until the case is declared inadmissible. Article 90(3). For the proposals at Rome see, A/CONF.183/WGIC/L.2, L.3, L.5, L.6, L.7, L.9, L.19. On Article 90 generally see K. Prost, “Article 90” in Triffterer (ed.), *supra* n.66, 1081.

<sup>80</sup> Article 90(4).

<sup>81</sup> Article 90(5).

<sup>82</sup> Article 90(6).

crime, then if the requested State is under no international obligation to extradite, the Court's request is paramount.<sup>83</sup> If it is under such an obligation, the State must decide.<sup>84</sup> As can be seen, the Court is given some priority, but by no means is this as extensive as that given to the UN tribunals, whose orders "trump" any other requests.

## ORDERS

Turning to co-operation with and assistance to the court on matters other than surrender,<sup>85</sup> there is a general duty to comply contained in Article 86.<sup>86</sup> Article 86 gives the court the right to make requests to States parties for cooperation.<sup>87</sup> Article 93 gives a non-exhaustive list of the requests with which the States parties are required to comply, which includes finding people or articles, taking and producing evidence, questioning suspects, serving documents, facilitating the voluntary appearance of witnesses and experts, examinations on site, executing searches and seizures, tracing and freezing assets, and "any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court".<sup>88</sup> With respect to this last provision, the exception of illegality in that State's national law could be very wide, giving a *de facto* veto for States over any request not expressly mentioned in the Statute. Fortunately this exception appears limited by Article 93(3). This provides that "where execution of a particular measure detailed in a

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<sup>83</sup> Article 90(7)(a).

<sup>84</sup> Article 90(7)(b).

<sup>85</sup> On this generally, see C. Kress, K. Prost, A. Schlunck & P. Wilkitzi, "Part 9" in Triffterer (ed.), *supra* n.66, 1045, P. Mochochoko, "International Cooperation and Judicial Assistance" in Lee (ed.), *supra* n.66, p.305.

<sup>86</sup> See C. Kress, "Article 86" in Triffterer (ed.), *supra* n.66, 1051. In addition, there is a duty under Article 59(1) to take steps to arrest any person subject to a request for arrest from the ICC. On Article 59 see A. Schlunck "Article 59" in Triffterer (ed.), *supra* n.66, 765. There is also a duty on States parties, under Article 88 to ensure this is possible under their national law. In theory, this should mitigate the requirement that all requests must be executed in accordance with national law (Article 88). If a State cannot execute a request due to its national law (other than under Article 93(3)) it is violating the obligation to cooperate (Article 87, 89(1) 93(1)) and the obligation to have the correct national laws and procedures in place (Article 88). For discussion of the cooperation regime in the ILC drafts, see J. Crawford, "The ILC's Draft Statute for an International Criminal Tribunal" (1994) 88 *A.J.I.L.* 140, pp.150-1. For the PRECOM discussions see A. Zimmermann, "The Creation of a Permanent International Criminal Court" (1998) 2 *Max Planck Y.B.U.N.L.* 169, pp.221-225.

<sup>87</sup> By virtue of Article 87(5) the ICC can make *ad hoc* agreements to cooperate with non State parties, to which the following regime applies. Article 87(6) gives the court the power to ask intergovernmental organisations to provide assistance. Article 89(1) appears to allow the Court to ask a non State party to surrender, but this will not bind that party without specific agreement.

<sup>88</sup> Article 93(1)(a-h)(i). See K. Prost, & A. Schlunck, "Article 93" in Triffterer (ed.), *supra* n.66, 1101.



request under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter.” If the matter cannot be resolved by these consultations, the request must be modified. The cumulative effect of these two provisions is that the request can only be denied if the national prohibition is based on “an existing fundamental legal principle of general application.” A problem is that the phrase in Article 93(3) is hardly free from ambiguity.

One of the major disappointments relating to the Rome Statute is the qualified obligation to comply with all requests, qualifications absent in the UN tribunal regimes. The first of these relates to the handing over of evidence which would prejudice a State’s national security. In sharp contrast to the UN tribunals, who have asserted the right to demand such evidence, the Rome Statute only imposes an obligation to consult with the court and to attempt in good faith to find a solution.<sup>89</sup> In the final analysis, a State is entitled to refuse the submission of this evidence, and the court cannot demand its production.<sup>90</sup> Its only possible response is to declare that the State is not acting in accordance with the Statute (i.e. that the State is not acting in good faith).<sup>91</sup> Wedgwood sums up the position and its possible effect correctly: “[i]f the State’s refusal to turn over national security information is made in good faith, that is the end of the matter, and, potentially, the end of a case”.<sup>92</sup>

Although there is a duty to consult the ICC and attempt to get around any impediment,<sup>93</sup> there are other ways in which a State may avoid complying with an order of the ICC. If the requested State is investigating a different crime, and immediately

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<sup>89</sup> Article 72, Article 93(4). See Wedgwood, *supra* n.51, p.646-8; D.J. Scheffer, “The United States and the International Criminal Court” (1999) 93 *A.J.I.L.* 12, p.15. For discussion of the matter in PREPCOM, see Hall, *supra* n.74, p.553. Katz Cogan, *supra* n.51, p.425 claims, with some justification, that this Article is too deferential to States.

<sup>90</sup> Article 72(6). Mochochoko, *supra* n.85, p.314 asserts that this is the only ground for refusal of surrender of documents. This may not be the case, as there is also, for example, information contained in a bag which has diplomatic protection, on the immunities of diplomats see, see *infra* pp.109-111.

<sup>91</sup> Article 72(7)(ii).

<sup>92</sup> Wedgwood, *supra* n.51, p.647. As will be seen, *infra*, p.267, this may have a particularly negative impact on the prosecution of certain offences.

<sup>93</sup> Article 97.



executing the request could interfere with that investigation, then that State may delay compliance.<sup>94</sup> It may also delay a request if there has been an admissibility challenge, unless the Court determines otherwise.<sup>95</sup> These provisions do not provide a reason to refuse the request outright. This is not the position for the exceptions to the duty to comply in Article 98.<sup>96</sup> Under Article 98(1), if the requested State would have to act inconsistently with the diplomatic or State immunity of a third State, it may refuse the request, unless the third State waives that immunity. This puts the obligations of cooperation with the court in a subordinate role to those on immunity, the converse of the position in the UN tribunals. Perhaps the reason for this is the long standing and important rules of diplomatic immunity.

This justification does not apply to the exclusion of the duty to comply in Article 98(2). This reads “the Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender”. This provision was added primarily to make provision for the situation of troops abroad under Status of Forces Agreements.<sup>97</sup> However, Status of Forces agreements frequently provide for offences on the territory of the receiving State to be the subject of that State’s jurisdiction, the exceptions being disciplinary offences and offences against the security of the sending State.<sup>98</sup> Therefore it is uncertain why the receiving State should not be able to transfer the accused to the court (at least if the offence was committed on its territory), which, after all, exists partially as the result of the cession of jurisdiction from the receiving State.

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<sup>94</sup> Article 94.

<sup>95</sup> Article 95.

<sup>96</sup> See generally, K. Prost, & A. Schlunck, “Article 98” in Triffterer (ed.), *supra* n.66, 1131.

<sup>97</sup> Arsanajani, *supra* n.67, p.411. On Status of Forces Agreements, see R.Y. Jennings & A. Watts, *Oppenheim’s International Law* (London: Longmans, 9<sup>th</sup> ed. 1992) pp.1154-1164; G.I.A.D. Draper, *Civilians and the NATO Status of Forces Agreement* (Leyden: Sitjhoff, 1966).

<sup>98</sup> See Jennings & Watts, *ibid.* p.1159. NATO Status of Forces Agreement, 1951, UKTS 3 (1955) Cmd 9363 Article VII. Any possible claim of State immunity must be rejected as it is in the essence of international

Also, Article 98(2) is broadly drafted and could apply far beyond pure Status of Forces Agreements, and acts as a virtual invitation to States to agree *inter se* a way out of the obligation to surrender to the Court.

The controversy surrounding this provision is shown by Wedgwood's suggestion that these agreements should be reached by the US, but "quietly".<sup>99</sup> The only possible limitation on the power of States to make these agreements is that between State parties, it could be possible that the Court could order (under Article 93(1)(l)) that the sending State transfer the person, or give its consent. If this is the case, then Article 98(2) will be limited to agreements between receiving States who are State parties, and sending States who are not. Even so, for a State using the Court on the basis of its territorial jurisdiction, this is a major derogation of its power to use its own jurisdiction (albeit exercised through the Court).

From the tenor of the Statute, it is clear that aside from the judgments themselves, the orders of the court do not directly bind individuals in States. The only time cooperation with the ICC is mentioned without reference to national procedures is Article 99(4), where measures "which can be executed without any compulsory measures" are directly executable, but only after "all possible consultations" with the State party concerned,<sup>100</sup> or when a Pre-Trial Chamber has determined the State party is unable to fulfil the request because there is no competent authority or judicial body able to do so.<sup>101</sup>

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crimes that State immunity does not apply. The non-applicability of the State immunity rules is dealt with in Chapter 3, pp.103-109.

<sup>99</sup> R. Wedgwood, "Fiddling in Rome" (1998) 77 *Foreign Affairs* 20, p.22.

<sup>100</sup> Article 99(4). On this controversial provision see K. Prost & A Schlunck, "Article 99" in Triffterer (ed.), *supra* n.66, 1135, pp.1138-1144; Mochochoko, *supra* n.85, pp.315-317.

<sup>101</sup> Article 57(3)(d).

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## POWERS TO ENFORCE ORDERS AND DECISIONS

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### NUREMBERG AND TOKYO IMTS

The Nuremberg IMT did not have any power to enforce its decisions *proprio motu*. It did not have its own police force or enforcement mechanisms. It did have the Control Council. From a practical standpoint, the Nuremberg IMT was integrated into the occupation of Germany, and its orders were carried out by the occupation authorities.<sup>102</sup> Sentences, too were not enforced by the tribunal, but by the Control Council,<sup>103</sup> who continued to do so after the Nuremberg IMT was disbanded.

The Tokyo IMT was in a very similar position, it had no police of its own, but was integrated into an occupation regime. The occupation authorities for Japan carried out the orders, and sentences were carried out under the orders of General MacArthur.<sup>104</sup>

### ICTY AND ICTR

The situation with relation to the UN Tribunals was discussed in the *Blaskic* Case. In this case the ICTY Appeals Chamber noted that the ICTY (which would include, by analogy, the ICTR) “does not possess any power to take enforcement measures against States... [because]... had the drafters of the Statute intended to vest the International Tribunal with such a power, they would have expressly provided for it. In the case of an international judicial body, this is not a power that can be regarded as inherent in its functions.”<sup>105</sup> Wedgwood criticises this approach, saying that the speed with which the ICTY Statute was drafted means that its absence may not have been determinative.<sup>106</sup>

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<sup>102</sup> Nuremberg IMT Rules of Procedure 4(c)(d).

<sup>103</sup> Nuremberg IMT Charter, Article 29.

<sup>104</sup> Tokyo IMT Charter, Article 17.

<sup>105</sup> *Blaskic*, *supra* n.11 para 25.

<sup>106</sup> Wedgwood, *supra* n.51, p.649.



There are certain problems with Wedgwood's view, in principle, and in practice. The UN Charter creates a system where enforcement authority is centralised primarily in the Security Council.<sup>107</sup> As a result, it cannot easily be presumed, in the absence of any indication of Council intent, that there has been delegation of one of its fundamental functions. In the past, for sanctions committees, there has been no such presumption of delegation, the position being that express wording was required.<sup>108</sup> Even presuming these obstacles could be overcome, practical problems remain to militate against Wedgwood's view. The ICTR Statute was drafted after the ICTY Statute, and no changes were made. If the Security Council had wished to make the delegation clear, it could have done so. Also, the *Blaskic* decision was hardly aberrational; the ICTY had taken its position from the beginning, when its Rules of Procedure provided that the Security Council is the only enforcer of its orders.<sup>109</sup> It has constantly maintained this position,<sup>110</sup> which is supported by the general opinion of scholars.<sup>111</sup> It would seem that the Security Council actions have supported this view. In a 1996 Presidential Statement, the Council said they were "ready to consider the application of economic enforcement measures" for

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<sup>107</sup> K. Dicke, "Comment" in J. Delbrück (ed.), *Allocation of Law Enforcement Authority in the International System* (Berlin: Duncker & Humboldt, 1995) 57, p.60.

<sup>108</sup> P. Conlon, "Lessons From Iraq: The Functions of the Iraq Sanctions Committee as a Source of Sanctions Implementation Authority and Practice" (1995) 35 *V.J.I.L.* 633, p.645. See also C.C. Joyner, "Sanctions, Compliance and International Law: Reflections on the United Nations' Experience Against Iraq" (1991) 32 *V.J.I.L.* 1, pp.16-17.

<sup>109</sup> Joint Rules 11,13,59,61, In 1997 rule 7bis with a general power to report violations was added to the specific cases in the earlier rules.

<sup>110</sup> See *5th Annual Report of the International Tribunal for the Prosecution of Those Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991* UN Doc. A/53/219; S/1998/737, para 226: "Lacking an autonomous enforcement agency, the Tribunal is unable to give effect to the plethora of orders, arrest warrants and decisions that it issues. Enforcement is dependent, therefore, on those entities that possess the legal and logistical capacity to act on the international stage. In joining the United Nations, they agree to accept and carry out the decisions of the Security Council, such as the one that established the Tribunal. Without their support and co-operation, the Tribunal cannot effectively discharge its mandate. In many respects, therefore, the umbilical cord is still attached. State support is the Tribunal's oxygen supply".

<sup>111</sup> See Morris & Scharf, (ICTY), *supra* n.13, p.313, Morris & Scharf (ICTR), *supra* n.13, pp.659-660; G. Hafner, "Limits to the Procedural Powers of the International Tribunal for Former Yugoslavia" In K. Wellens (ed.), *International Law: Theory and Practice* (The Hague: Kluwer, 1998) 651, p.656; Bassiouni & Manikas, *The Law of the International Criminal Tribunal for Former Yugoslavia* (New York: Transnational, 1996) pp.775-779, M. Schrag, "The Yugoslav Tribunal: An Interim Assessment" (1997) 7 *Transnational L. & Contemporary Problems* 15, p.17; P. Malanczuk, "The International Criminal Tribunal's Power to Issue *Subpoena Duces Tecum*" in E. Denters & N. Schrijver (eds.), *Reflections on International Law from the Low Countries* (The Hague: Kluwer, 1998) 260, p. 271, Greenwood, *supra* n.41, p. 108; Joyner, *supra* n.47, p.93. The Netherlands, in its *amicus curiae* Brief in the *Blaskic* Case, para 17, implied that the ICTY may have an enforcement power.

failure to co-operate with the ICTY.<sup>112</sup> This implies that the Council thought that it was the Council's right to impose any enforcement measures. Also, in Resolution 1207, the Security Council asked the President of the ICTY to "keep the Council informed about the implementation of... [the obligations to comply with the ICTY]... for the Council's further consideration".<sup>113</sup> Again, the Council appears to be of the view that the UN tribunal's job is to report non-compliance to them, not that the Council has passed onto them any enforcement powers.

This concurs with the ICTY's view, expressed in *Blaskic*, that: "[t]he International Tribunal is not vested with any enforcement power. It is primarily for its parent body, the Security Council, to impose sanctions, if any, against a recalcitrant State".<sup>114</sup> As a secondary source of coercion, the ICTY has said that States can take certain action, including "political or moral condemnation, or a collective request to cease the breach or economic or political sanctions... In addition, collective action [presumably of a non-forcible nature] would be warranted in the case of repeated and blatant breaches of Article 29 by the same State; and provided the Security Council had not decided that it enjoyed exclusive powers on the matter, the situation being part of a general condition of a threat to the peace".<sup>115</sup> These could not be forcible, given that there is no right of unilateral forcible enforcement of Security Council Resolutions.<sup>116</sup>

In only one instance has the ICTY alluded to direct enforcement powers, this was in the exceptional situation mentioned by the Appeals Chamber in *Blaskic*, where the tribunal has directly contacted a person, and issued a *subpoena*. The Tribunal claimed that if the person failed to obey the *subpoena* then they could hold that person in contempt of

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<sup>112</sup> S/PRST/34. 8 August 1996. See D. Petrovic, "The Post-Dayton Role of the International Criminal Tribunal for Yugoslavia", in M. O'Flaherty & G. Gisvold (eds.) *Post War Protection of Human Rights in Bosnia and Herzegovina* (The Hague: Kluwer, 1998) 195, pp.206-206.

<sup>113</sup> UN Doc. S/RES/1207, para 5. The Resolution reiterates the obligation in Resolution 827, calls upon Yugoslavia to comply with orders under Article 29 of the ICTY Statute, and demands it surrenders three suspects.

<sup>114</sup> *Blaskic*, *supra* n.11, para 33.

<sup>115</sup> *Ibid.* para 34.

<sup>116</sup> C. Gray, "After the Cease-Fire: Iraq, the Security Council and the Use of Force" (1994) 65 *B.Y.B.I.L.* 135 at p.177, R. Higgins, *Problems and Process: International Law and How We Use It*. (Oxford: OUP, 1994) p.259;



the tribunal, *in absentia*, provided that full due process was followed.<sup>117</sup> Even here, though, the ICTY limited this to individuals acting in their private capacity, and of course, ignored the more difficult question of who would enforce the contempt judgment.

It might be thought that in the territory of Bosnia, the answer to the absence of enforcement jurisdiction could be the Implementation Force IFOR (now the Stabilisation Force SFOR). It operates on the territory of Bosnia, and has the power to enforce, most importantly, the transfer orders. The debate about whether or not IFOR is under a duty to enforce orders addressed to it (and thus, in Bosnia, act almost as the ICTY's police force) has continued for some time.<sup>118</sup> NATO (as the primary component of IFOR) considers itself under no such obligation, but either way, it is questionable if this debate gets to the core of the matter. This is because the obligation would fall on the States comprising IFOR themselves. IFOR is an entity external to the ICTY, and is thus not part of its enforcement structure. There is nothing the tribunal can do itself to compel IFOR to act. In the end, the Court has to rely on reference to the Security Council, being devoid of its own enforcement mechanisms. Thus Cassese was correct in referring to it as a "giant without arms and legs",<sup>119</sup> as was Wedgwood in noting the absence of power could "even call into question the efficacy of the *ad hoc* tribunal as a judicial fact finding body".<sup>120</sup>

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N.D. White & R. Cryer, "Unilateral Enforcement of Resolution 687: A Threat too Far?" (1999) 29 *Cal. W.I.L.J.* 243, pp.266-279.

<sup>117</sup> *Blaskic*, *supra* n.11, paras 59-60, they based themselves on Rule 77 and an inherent power to find someone in contempt.

<sup>118</sup> See N. Figa-Talamanca, "The Role of NATO in the Peace Agreement for Bosnia and Herzegovina" (1997) 7 *E.J.I.L.* 164; J.R.W.D. Jones, "The Implications of the Peace Agreement for The International Criminal Tribunal for the Former Yugoslavia" (1996) 7 *E.J.I.L.* 226, pp.238-240; *contra* P. Gaeta, "Is NATO Authorised or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia" (1998) 8 *E.J.I.L.* 174 (no duty).

<sup>119</sup> A. Cassese, "On the Current Trend Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" (1998) 9 *E.J.I.L.* 2, p.13.

<sup>120</sup> Wedgwood, *supra* n.51, p. 648.



In relation to sentencing, although they are entitled to hold persons on remand (Rule of Procedure 64),<sup>121</sup> the tribunals have no power to enforce their own sentences. Article 27 of the ICTY Statute (Article 26 ICTR Statute) provides that terms of imprisonment are to be served in the prisons of States who have indicated their willingness to take such convicts as they arise.<sup>122</sup> The tribunal's primacy is ensured though, by virtue of Article 27 of the ICTY Statute (Article 26 ICTR Statute), which provides that although the imprisonment shall be in accordance with the local law, this is subject to the "supervision" of the tribunal. As Tolbert explains, "what appears... to be envisaged is a co-operative relationship, with the State assuming the responsibility of the day to day supervision of the terms of imprisonment, provided that the tribunal is entitled to veto any fundamental change in the sentence, such as a pardon, in which case the tribunal has the ultimate authority, which authority must be respected by the state".<sup>123</sup> This is borne out by ICTY Statute Article 28 (ICTR Statute Article 27), which demands that if, by the law of the enforcing State, the prisoner would be eligible for parole or commutation of sentence, then the State must inform the tribunal, who will decide if this is to occur.<sup>124</sup>

## ICC

The position in the Rome Statute is quite clear. For all intents and purposes the Court has no enforcement powers for its orders. In the event of State failure to comply

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<sup>121</sup> This is clearly subject to Tribunal control, for example, the powers in Rules 64-5 in relation to the conditions of detention and provisional release are given to the President and the Trial Chambers. The Rules of Detention were adopted by the Tribunal (IT/38/Rev.7). Although the detention facility is in a Dutch jail, it is subject to UN powers, not Dutch rules, (see Schutte, *supra* n.9, p.211).

<sup>122</sup> So far, Italy, Norway, Finland and Sweden have made agreements with the ICTY to enforce sentences, other States have agreed to accept convicts, but have made no agreements to that effect, See *5<sup>th</sup> Report Of The International Tribunal For The Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of The Former Yugoslavia Since 1991*, UN. Doc A/53/219, paras 251-254. For ICTR sentences, Norway, Denmark, Switzerland and Sweden have agreed to accept prisoners, *5<sup>th</sup> Report Of The International Tribunal For The Prosecution Of Persons Responsible for Genocide and Serious Violations of International Humanitarian Law on the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations of International Humanitarian Law in the Territory of Neighbouring States Between 1 January and 31 December 1994*, UN. Doc. A/54/315, para 121. In August 2000 Lesotho and Mali agreed to enforce ICTR sentences.

<sup>123</sup> D Tolbert, "The ICTY and the Enforcement of Sentences" (1998) 11 *L.J.I.L.* 655, p.661. See also Rules of Procedure 103-104.

with an order of the Court, the Court can make a finding of non-compliance, then it may refer the matter to either the Assembly of State Parties, or to the Security Council.<sup>125</sup> The Court may only refer the matter to the Security Council if it was the Security Council who initially referred the matter to the Court under Article 13(b).<sup>126</sup> The Security Council's powers to compel compliance come under Chapter VII of the UN Charter, and lie beyond the scope of this study. The Assembly of State Parties under the Rome Statute is granted no sanctioning or enforcement powers under the Statute, and its ability to enforce the ICC's orders, or deal with recalcitrant State Parties must be considered very limited.

In relation to sentences, the position is similar to that of the UN tribunals, the ICC will not have its own prison, but sentences "shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons".<sup>127</sup> As with the UN tribunals, the enforcement of the sentence is governed by the local State's laws (and must be in accordance with "accepted international treaty standards"),<sup>128</sup> but is subject to the supervision of the Court.<sup>129</sup> The Court is the only body entitled to reduce the sentence of any convict, and the enforcing State is not entitled to release them before the expiration of the period set by the Court.<sup>130</sup>

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<sup>124</sup> See Rules of Procedure 123-125 (ICTY) & Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal 7 April 1999. Rules of Procedure 124-126 (ICTR).

<sup>125</sup> Article 87(7).

<sup>126</sup> *Ibid*.

<sup>127</sup> Article 103(1)(a). See G.A.M. Strijards, "Article 103" in Triffterer (ed.), *supra* n.66, 1159; T.P. Chimimba, "Establishing an Enforcement Regime" in Lee (ed.), *supra* n.66, 345.

<sup>128</sup> Article 106(2).

<sup>129</sup> Article 106(1).

<sup>130</sup> Article 110(1)(2).

## JURISDICTION

### NUREMBERG IMT

The Jurisdiction of the Nuremberg IMT was, according to the London Charter, over those war criminals whose offences had no particular geographical location.<sup>131</sup> This could be very broad, but it was drastically limited by the reference to the Moscow declaration, which limited it to offences by the Axis powers in the European sphere of WWII. It is this aspect which provided the second thread of the charge of victor's justice against the Nuremberg IMT. Not only were the judges drawn entirely from the victorious nations, but the laws in the Charter "were applied exclusively to the acts of the vanquished".<sup>132</sup> Indeed, any mention of alleged war crimes or aggressive acts by the Allied powers was banned by the Tribunal, which was required to "confine the Trial strictly to an expeditious hearing of the issues raised by the charges... [and]... take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever".<sup>133</sup> Given the jurisdictional limitation to offences committed by one set of belligerents, in one conflict, the legitimacy of the Nuremberg IMT must be considered compromised here.

### TOKYO IMT

To a large extent, similar comments are relevant to the Tokyo IMT. It was mandated to try the "Far Eastern War Criminals". These were limited to the Japanese. As with the Nuremberg Charter, mention of offences by the Allies was precluded by the Tokyo IMT's constituent document.<sup>134</sup> Again, given that there were questions about various Allied actions in the war, the limits on the Tokyo IMT's jurisdiction led to the claims of

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<sup>131</sup> Nuremberg IMT Charter, Article 1.

<sup>132</sup> M. Lippman, "Nuremberg 45 Years Later" (1991) 7 *Connecticut J.I.L.* 1, p.37.

<sup>133</sup> Nuremberg IMT Charter, Article 18(a)(b).

<sup>134</sup> Tokyo IMT Charter, Article 12(a)(b).



victor's justice and an inability to engage in self-scrutiny by the Allies. Both Nuremberg and Tokyo were marred by their concentration, not only on the offences in one conflict, but also by the one sided prosecution of the defeated side alone.

## ICTY AND ICTR

Articles 1 and 8 of the ICTY Statute circumscribe its jurisdiction. It has jurisdiction over offences committed on the territory of the former Yugoslavia since 1991.<sup>135</sup> Obviously, by its terms, the geographical limit is very clear. There is no possibility that the ICTY's jurisdiction over the offences in its Statute apply to those beyond the old borders of Yugoslavia or before 1 January 1991 (importantly, given the recent violations of the ICTY Statute in Kosovo, there is no cut off date in the ICTY Statute).<sup>136</sup> The position with the Rwanda Statute is slightly different. Article 7 grants the ICTR jurisdiction over offences in Rwanda and offences in "neighbouring States", the latter if committed by Rwandan citizens. The temporal limit is greater here, being confined to one year (1 January 1994-31 December 1994).<sup>137</sup> As can be seen, the UN Tribunals are limited in geographical and temporal scope, the ICTR being particularly limited temporally. Some say the Security Council is now suffering from "Tribunal fatigue"<sup>138</sup> and thus is unlikely to create any more Tribunals. This could be thought to reduce the legitimacy of the UN Tribunals, as they are shown to be limited measures responding to particular situations, selective in that other conflicts, such as those in Liberia or the Congo remain without similar UN responses. "Tribunal fatigue" may have been a fact in the late 1990s, or it may not, but the recent action of the Security Council relating to Sierra Leone (see *infra* p.179) militates in favour of the view that it is not now. Still, Harris is correct in stating that

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<sup>135</sup> See Levie, *supra* n.30, p.14.

<sup>136</sup> See Morris & Scharf (ICTY), *supra* n.13, Ch.VII The Security Council has expressly accepted that the ICTY has jurisdiction over the Kosovan conflict, SC Resolution 1160, UN Doc. S/RES/1160, SC Resolution 1203, UN Doc. S/RES/1203.

<sup>137</sup> See Morris & Scharf, (ICTR), *supra* n.13, Ch.VII.

<sup>138</sup> M.P. Scharf, "The Politics of Establishing an International Criminal Court" (1995) 6 *Duke J.C. & I.L.* 167, p.169.

“despite the end of the cold war, there is absolutely no guarantee that the international community will not turn a blind eye to the next Rwanda or Yugoslavia”.<sup>139</sup> The Security Council has not considered itself under any legal duty to respond to any other conflicts in a similar way, and, where actions, friends or allies of one of the Permanent five members of the Council are concerned, they will be protected by the veto.<sup>140</sup>

One significant improvement over the Nuremberg and Tokyo IMTs must be noted, and it is this that saves a great deal of their legitimacy. They may be reactive responses, limited to the conflicts which they were created for, but unlike the Nuremberg and Tokyo predecessors, they apply equally to all parties to the conflict.<sup>141</sup> In relation to the ICTY, Rubin has asserted that “[the Security Council] made sure that only atrocities by participants in the actual struggle in the former Yugoslavia would be within the Tribunal’s purview; their own activities, even as armed ‘peacekeepers’ there, are not”.<sup>142</sup> There is no legal basis for this belief, the limitations on the jurisdiction of both Tribunals are geographical and temporal alone.<sup>143</sup> This represents a large factor in ensuring a greater legitimacy, particularly as part of its mandate is to individualise guilt. It would be impossible for the Tribunals to do this if they were limited to certain parties to both conflicts. That said, it would take a politically brave prosecutor to indict a national of one of the P5, (particularly the US), given that they created the Tribunals, and are amongst its strongest supporters.<sup>144</sup> The refusal of the ICTY Prosecutor, in 2000 to indict or undertake serious investigation into allegations of violations of the laws of war by NATO

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<sup>139</sup> D.J. Harris, “Progress and Problems in Establishing an International Criminal Court” (1998) 3 *J.A.C.L.* 1, p.3.

<sup>140</sup> Scharf, *supra* n.138, p.170. Similarly, the notorious indictee “Arkan” has claimed that he rejects the authority of the ICTY as the US has never been brought to trial for its actions in Hiroshima, Nagasaki, Vietnam, Cambodia and Panama. R. Dixon, “New developments in the International Criminal Tribunal for the Former Yugoslavia: Prominent Leaders Indicted and Jurisdiction Established” (1995) 8 *L.J.I.L.* 449, pp. 460-461.

<sup>141</sup> M.C. Bassiouni, “From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Criminal Court” (1997) 10 *Harvard H.R.J.* 11, p.43.

<sup>142</sup> A.P. Rubin, “Dayton, Bosnia and the Limits of Law” (Winter 1996/1997) 47 *The National Interest* 41, p.42.

<sup>143</sup> This was confirmed by the prosecutor on 20<sup>th</sup> May 1999, who said NATO countries, by their actions “have voluntarily submitted themselves to the jurisdiction of a pre-existing International Tribunal, whose mandate applies to the theatre of their chosen military operations, whose reach is unqualified by nationality, whose investigations are triggered at the sole discretion of the Prosecutor and who has primacy over national courts”. (1999) 125 *Tribunal Update*.



when bombing Kosovo bears this out. Despite the exceptional action by the Prosecutor, in making the internal report on the allegations public,<sup>145</sup> the suspicion remains that her refusal to investigate further was partially motivated by the severe displeasure with which the US (in particular) received the news that she was investigating at all.

## ICC

Some of the States negotiating at the Rome conference wanted the ICC to be empowered to assert universal jurisdiction at all times, and there is no reason, in law, why this could not have been the case.<sup>146</sup> Politically, this was not possible (it was on this issue that the Rome conference finally broke consensus).<sup>147</sup> As a result, the Court is given jurisdiction first of all over offences committed on the territory of, or by a national of, one of the States party.<sup>148</sup> For these the Prosecutor has *proprio motu* powers, thus she may begin investigations without a reference from States or the Security Council. Under this head of jurisdiction, the Court will have as broad a jurisdiction as it has States party. It is therefore the only court which, with high levels of State ratifications, could have jurisdiction over a large part of the globe. It could thus be the most legitimate, particularly

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<sup>144</sup> NATO spokesman Jamie Shea, with reference to what the Prosecutor said (*ibid.*) said that "NATO is a friend of the Tribunal...[and]... would allow Justice Arbour to go to Kosovo and investigate. NATO are the people who have been detaining indicted war criminals for the Tribunal".

<sup>145</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (undated), and press release, 13 June 2000 PR/ P.I.S./ 510-e.

<sup>146</sup> Zimmermann, *supra* n.86 pp.205-206. For the debates on this issue, from the ILC (1993) on, see, Crawford (1994) *supra* n.86, p.412; Hall (3<sup>rd</sup> & 4<sup>th</sup> Sessions), *supra* n.66, p.131; Hall, (6<sup>th</sup> Session) *supra* n.74, p.549; M. Politi, "The Establishment of an International Court at a Crossroads: Issues and Aspects After the First Session of the Preparatory Committee", in Bassiouni (ed.) *supra* n.66, 115, pp.148-152. For Rome documents see A/CONF.183/C.1/L.6, L.53 (Article 7), L.59 (Article 7), L.70.

<sup>147</sup> See E. Wilmschurst "Jurisdiction of the Court" in Lee (ed.), *supra* n.66, 127; E. La Haye, "The Jurisdiction of the International Criminal Court: Controversies Over the Preconditions for Exercise of its Jurisdiction" (1999) 46 *N.I.L.R.* 1; R. Dicker, "Issues Facing the International Criminal Court's Preparatory Commission" (1999) 32 *Cornell I.L.J.* 471, p.473 canvasses US approaches to re-opening the jurisdictional clauses of the Rome Statute.

<sup>148</sup> Article 12. See S.A. Williams, "Article 12" in Triffterer (ed.), *supra* n.66, 329. In addition, States can agree, under Article 12(3) to the Court exercising jurisdiction over one or more of the categories of crimes. For war crimes, for the first seven years of the existence of the Court, it will also be contingent on the nationality or territorial State not both having opted out of the jurisdiction of the Court under Article 124 on which see A. Zimmerman, "Article 124" in Triffterer (ed.) *ibid.*, 1281.



as it is set up prior to the commission of any of the offences for which it may assert jurisdiction.<sup>149</sup>

In addition to this (practical politics means that it is unlikely that every State, or even an overwhelming majority of States, will ratify the Statute), the ICC has another form of jurisdiction, one based on universality. For this, the Security Council has to pass the matter to the Court under Article 13(b). Given that in *Tadic* the ICTY expressly rejected the view that the Security Council had criminal competence, it must be the Court which has this universal jurisdiction.<sup>150</sup> For the exercise of this jurisdiction, the Security Council must have passed the matter to the prosecutor, who has no *proprio motu* powers to investigate here. Thus although the Court has, in one way, universal jurisdiction, this is only exercisable on a contingency outside the power of the Court. This form of jurisdiction is just as selective as the decisions of the Security Council to create the ICTY and ICTR. Nonetheless, the Court has the possibility of having a very wide jurisdictional basis for future offences, and will be by far the most global in scope, not being created for one particular conflict, or set of parties to that conflict.

## CONCLUDING REMARKS

Extensive debate relating to the possibilities of the Nuremberg and Tokyo IMTs being models for the integrated system of international criminal law enforcement is not worthwhile. They were both integrated into regimes exercising authority over the territory and persons over which they were acting, therefore, in many ways, for enforcement purposes, were more akin to national courts than international courts, although their legal basis remains international law. Their jurisdictional scope was limited to the losing side in a particular war, giving rise to criticisms of “victor’s justice” The UN Tribunals, with

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<sup>149</sup> Article 24 limits its jurisdiction, to offences committed after the Statute comes onto force.

<sup>150</sup> *Tadic* AR72, *supra* n.14, para 38.

powerful obligations to accept their orders represent in some ways a best case scenario for the powers of international criminal courts. The absence of any enforcement authority goes some way to undermining the efficacy of those obligations. Their jurisdiction, although limited to one set of circumstances, is more equitable, applying, in theory anyway, to all parties involved in the conflict. In practice though, this has not been the case. The Rome Statute structurally being more a creature of political compromise than the two UN Tribunals, has less intense duties of compliance, subject to enforcement only via the Assembly of States Parties, or (if it chooses to send a situation to the court) the Security Council.<sup>151</sup> This weakening must be balanced against the increased jurisdictional reach of the ICC when it comes into existence. The remainder of this part of the thesis will attempt to sketch some of the implications the creation of these three bodies has had, will have, and could have, on the regime for the prosecution of international crimes.

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<sup>151</sup> See *supra* p.85.

# CHAPTER 3: THE LEGAL PROBLEMS OF THE INDIRECT ENFORCEMENT REGIME: ARE INTERNATIONAL CRIMINAL TRIBUNALS THE ANSWER?

## INTRODUCTION

It is all too easy, given the prominence of international tribunals, to overlook the primary enforcers of international criminal law, national courts. While international courts are of higher profile, the bread-and-butter enforcement should be carried on at the national level, and this is no coincidence. International criminal law itself does not primarily place enforcement on the international level. Of all the substantive international criminal law conventions in force, only two, the Genocide Convention,<sup>1</sup> and the Apartheid Convention<sup>2</sup> even mention enforcement by an international tribunal. The Geneva Conventions Grave Breaches regime, considered to contain paradigmatic international crimes, does not mention international enforcement.<sup>3</sup> Indeed, what characterises a Grave Breach is an obligation on States to make it a crime in the municipal sphere and either prosecute malefactors themselves or extradite them to another contracting State.<sup>4</sup> Until recently, State obligations under international law relate almost entirely to national prosecutions. The fact that national courts are the preferred fora for the enforcement of international criminal law is reiterated by the Rome Statute for the

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<sup>1</sup> 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, Article VI.

<sup>2</sup> 1973 International Convention on the Suppression and Prevention of the Crime of Apartheid, 1015 UNTS 245, Article V.

<sup>3</sup> 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, Article 49; 1949 Geneva Convention II for the Amelioration for the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 Article 50; 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, 75 UNTS 135, Article 129; 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, Article 146. See H. Fischer, "Grave Breaches of the 1949 Geneva Conventions" in G.K. McDonald & O. Swaak-Goldman (eds.), *Procedural and Substantive Aspects of International Criminal Law* (The Hague: Kluwer, 2000) 67.

<sup>4</sup> *Ibid.*



International Criminal Court.<sup>5</sup> The court is based on the principle of complementarity, i.e. it acts at most in tandem with national jurisdictions: it does not exercise primacy over them.<sup>6</sup> It is meant only to act as a jurisdictional back stop, when a national court is either “unwilling or unable” to take the case.<sup>7</sup>

It is the purpose of this chapter to evaluate the legal regime relating to the national implementation of international criminal law. Certain problems are identified, not least in the law and practice of extradition, which is central to the transfer of suspects to jurisdictions willing to prosecute. The problems relating to extradition in many ways are indicative of the tension identified in the introduction,<sup>8</sup> between the universal nature of the international crimes undermining sovereignty-based assumptions, and the bilateralist, Statist system which is still identifiable in the international system. The chapter proceeds by evaluating the effectiveness of the legal regime surrounding the prosecution of international crimes nationally, through the “indirect” enforcement system. Problems that have arisen in practice with jurisdiction, extradition, the non-existence of a general duty to extradite or prosecute, and the differing approaches of national laws to international crimes will be noted. In each instance an investigation into the extent to which the existence of, and legal regime surrounding, international criminal tribunals has served to improve matters.

When the focus turns to the ways in which international criminal tribunals have (or have not) overcome the problems identified, reference will be made primarily to the recent UN tribunals and ICC. This is because the two earlier IMTs were very much *sui generis* institutions, sitting for a single trial each (although there were numerous defendants in each trial). They were not integrated into a system of enforcement of international crimes. This was partially as the idea that international crimes required an international

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<sup>5</sup> A/CONF.183/9; (1998) 37 *I.L.M.* 999.

<sup>6</sup> This is clear from the Preamble, which, in paragraph 10 “Emphasi[s]es that the international criminal Court... shall be complementary to national criminal jurisdictions” and Article 1 of the Statute “its jurisdiction... shall be complementary to national criminal jurisdictions”.

<sup>7</sup> *Ibid.* Article 17.

<sup>8</sup> pp.7-10.

response it primarily traceable to those two institutions. The other reason is that due to the military defeat of the Axis powers, and the position of the Allies as occupiers (albeit of a special kind in the case of Germany) of the States where the defendants were located, third parties were not required for obtaining defendants. The UN Tribunals and the ICC are different, as they are intended to operate in tandem with national jurisdictions. To differentiate these tribunals is not to say that there is, as yet, a truly functioning integrated system of prosecution for international crimes. But it is emerging. With the advent of the Rome Statute, a clear trend towards an integrated system is discernible.

## JURISDICTION

### JURISDICTIONAL CLAIMS

As the offences involved in international criminal law are often anticipated to be prosecuted outside of their *locus delicti*, discussion of the principles of jurisdiction relevant to extra-territorial jurisdiction applicable to war crimes, aggression, crimes against humanity and genocide is relevant. Perhaps the reason for the traditional absence of enforcement outside the territory of commission is referable to a real or imagined lack of jurisdiction. The reason for the choice of these crimes, as opposed to offences such as terrorism, is that these crimes are generally considered to be the “core” offences against international law, and are the types of crimes over which the three international criminal tribunals this decade have jurisdictional competence.<sup>9</sup>

There are various strands of jurisdiction other than territoriality, for example nationality, protective and passive personality. They all have their limits, be they upon who is subject to them (nationality, passive personality) or to which kind of offences they

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<sup>9</sup> The Rome Statute gives the permanent court jurisdiction over aggression, however, the court is prohibited from exercising this jurisdiction unless and until the States party to the statute agree a definition, at the earliest, seven years from the entry into force of the statute. (Article 5(2) Rome Statute).



apply (protective).<sup>10</sup> There is a common theme to all these heads of jurisdiction, they are granted by international law to a State so it may protect its national interests.<sup>11</sup> However there is an exception to this trend for one form of jurisdiction, universal jurisdiction. Here an interest of all States in the maintenance of a norm is considered so strong it may be analogised to a national interest for all States.<sup>12</sup> This can be seen as evidence of the rise of new values in the international system, establishing a community based interest, that is passed on to individual States. This underlines the idea that such crimes are an attack on the international legal order itself,<sup>13</sup> an order in which States all have an interest in upholding.<sup>14</sup> The result of this is that if an offence subject to universal jurisdiction is committed, any State may prosecute the offence, irrespective of where, or by whom, the offence was committed. This exceptional form of jurisdiction covers the three main offences discussed here.

For genocide, there were some initial questions about whether or not jurisdiction was universal, as the Genocide Convention itself only provides for jurisdiction of the territorial State, or an international tribunal.<sup>15</sup> A proposal to include universal jurisdiction in the convention was dropped.<sup>16</sup> It has since been settled that customary international law permits States to invoke universal jurisdiction over this offence, and crimes against

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<sup>10</sup> See P. Malanczuk, *Akehurst's Modern Introduction to International Law* (London: Routledge, 7th ed. 1997) pp. 110-13; C. Blakesley, "Extraterritorial Jurisdiction" in M.C. Bassiouni (ed.), *International Criminal Law Vol. II: Procedural and Enforcement Mechanisms* (New York: Transnational, 2nd ed. 1999) 33 The classic treatment of jurisdiction remains M. Akehurst, "Jurisdiction in International Law" (1972-1973) 46 *B.Y.B.I.L.* 145.

<sup>11</sup> B. Stern, "Better Interpretation and Enforcement of Universality Jurisdiction" in C. Joyner (ed.), *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights* (St. Agne: Érès, 1998) p.175 at p.177.

<sup>12</sup> *Ibid.*

<sup>13</sup> On which, see R. Higgins, *Problems and Process*, (Oxford: Clarendon, 1994) pp.58-59.

<sup>14</sup> On the idea that all States have an interest in the upholding of an international order bounded by law see A. Watts, "The Importance of International Law" in M. Byers (ed.), *The Role of Law in International Politics* (Oxford: OUP, 2000) 5, p.7.

<sup>15</sup> *Supra* n.1.

<sup>16</sup> Genocide: Draft Convention and Report of the Economic and Social Council, Report of the Sixth Committee. 3d Sess. UN Doc. A/760 (1948) p.8, 3 UNGAOR 6th Committee, 3d Sess. 100th, 130th-133rd meetings. See S. Ratner & J. Abrams, *Accountability for Human Rights Atrocities in International Law* (Oxford: Clarendon, 1997) p.142.



humanity.<sup>17</sup> War crimes, at least in the sense of the Grave Breaches regime are subject to universal jurisdiction both by the regime set up in the conventions themselves,<sup>18</sup> and customary international law.<sup>19</sup> This is because the obligation in the regime is to enact legislation enabling the prosecution of all offenders irrespective of nationality or *locus delicti*.

It would thus seem that universal jurisdiction could almost be seen as a panacea, solving many of the enforcement problems of international criminal law. However, until recently, State practice on its usage was rather weak. An example would be the *Eichmann* case, which also relied on the protective and passive personality heads of jurisdiction.<sup>20</sup> This has led some to go as far as to say that practice on universal jurisdiction is “so sketchy that at present...it appears to hold little promise for effective national prosecution.”<sup>21</sup> This does not alter the legal position if jurisdiction is seen as a right, not a duty.<sup>22</sup> As Stern points out, under-use of universal jurisdiction “is not because it is not available as a matter of international law; rather it is because States most often are not eager to deal with crimes-however odious, committed by foreigners, against foreigners,

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<sup>17</sup> See, for example *A-G of Israel v Eichmann* (Trial Court) (1968) 36 I.L.R. 18, 26-57, *Matter of the Extradition of Demjanjuk* 776 F.2d. 571, pp.582-3. Ratner & Abrams, *ibid.*, p.143. Also see K. Randall, “Universal Jurisdiction Under International Law” (1988) 66 *Tex.L.R.* 785, pp. 788-90; W. Cowles, “Universality of Jurisdiction Over War Crimes” (1945) 33 *Cal.L.R.* 177; Higgins, *supra* n.13; I. Brownlie, *Principles of International Law* (Oxford: Clarendon, 5<sup>th</sup> ed., 1998), pp.308-309; C.C. Joyner, “Arresting Impunity, The Case for Universal Jurisdiction in Bringing War Criminals to Accountability” (1996) 59 *L. & Contemporary Problems* 153; C.L. Blakesley & O. Lagodny, “Finding Harmony Amidst Disagreement Over Extradition, Jurisdiction, the Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law” (1991) 24 *Vanderbilt J.T.L.* 1, p.35.

<sup>18</sup> *Supra* n.3.

<sup>19</sup> The Grave Breaches regime was held to be customary in *Prosecutor v Tadic*, Opinion and Judgment, 7 May 1997, IT-94-1-T, para 577. They may, however have been referring to the acts prohibited, rather than the duty imposed. As the Geneva Conventions are to all intents, universally ratified, this is not a matter of great importance.

<sup>20</sup> *Supra* n.12.

<sup>21</sup> L.S. Sunga, *The Emerging System of International Criminal Law* (The Hague: Kluwer, 1997) p.250.

<sup>22</sup> If it is conceived of as such (as it is here, see *infra*) then the matter becomes not whether there are large numbers of such prosecutions, but whether or not they are protested. As far as the author is aware, none of the prosecutions mentioned in this section on the establishment of universal jurisdiction have been protested. The conception of universal jurisdiction as a right rather than a duty refutes the argument of, for example, Lord Slynn in *R v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte* [No. 1] [1998] 4 All E.R. 897 p.913, “It does not seem to me that it has been shown that there is any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in national courts on the basis of universality of jurisdiction.” To say there is no practice at all is easily empirically falsified, as the *Eichmann* case was cited before them. It seems more likely that he was confusing the ideas of a right and duty of prosecution, and noting that there are not many cases.

outside their territory”.<sup>23</sup> This is changing to a certain extent. Whilst in France the *Decision de Tribunal de Grande Instance* 6<sup>th</sup> May 1997<sup>24</sup> a retrogressive denial of universal jurisdiction under French legislation occurred, other countries are beginning to use either treaty based or customary universal jurisdiction in prosecutions of non nationals. Uses or assertions of universal jurisdiction have recently been reported in Switzerland,<sup>25</sup> Austria,<sup>26</sup> Denmark,<sup>27</sup> Germany,<sup>28</sup> Canada<sup>29</sup> and Belgium.<sup>30</sup> These are welcome instances of State practice actually using universal jurisdiction, and a refutation of the idea that it is merely a theoretical construct.<sup>31</sup> In particular, the Austrian case of *Dusko C* was particularly interesting, implying universal jurisdiction into the Genocide Convention if there is no functioning territorial judiciary.<sup>32</sup> This shows that if judicial and political will is present, universal jurisdiction can be an important part of national prosecution efforts. At the international level, Germany has recently noted that there is universal jurisdiction over

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<sup>23</sup> *Supra* n.11, p.178.

<sup>24</sup> *Ibid.* pp 187-8. For discussion of the earlier decision overturned by the *Tribunal* see R. Maison, “les premiers cas d’application des dispositions pénales des Conventions de Genève par les juridictions internes” (1995) 6 *E.J.I.L.* 260. See also B. Stern, “International Decisions: *In re Javor*, *In re Munyeshaka*” (1999) 93 *A.J.I.L.* 525, p.529 commenting that “these cases illustrate the reluctance of French Courts to assert universal jurisdiction”.

<sup>25</sup> *In re G* Military Tribunal, Division 1, Lausanne, 18th April 1997, noted A. Ziegler, “International Decisions: *In re G*” (1998) 82 *A.J.I.L.* 78. The case applied *Code Penale Militaire* Art 2(9) & Arts 108-14, which assert universal jurisdiction over war crimes.

<sup>26</sup> *Dusko C*. Beschluss des Obersten Gerichtshofs Os99/94-6, 13th July 1994. See A Marschik, “European National Approaches to War Crimes” in T.L.H. McCormack & G. Simpson (eds.), *The Law of War Crimes: National and International Approaches* (The Hague: Kluwer, 1997) 65, pp.79-82.

<sup>27</sup> *Refac Saric*, Oestre Landsret Decision of 25 November 1994.

<sup>28</sup> *Public Prosecutor v Djajic* No20/96. Supreme Court of Bavaria, 3d Strafsenat, 23rd May 1997. Noted C.J.M. Safferling, (1998) 92 *A.J.I.L.* 528. Applying German Penal Code s6(9) German Penal Code, which gives Germany jurisdiction over offences over for which Germany has an international duty to punish (which the court took to include genocide). The German courts have asserted universal jurisdiction over other offenders in the ex-Yugoslav context, for example Nikola Jorgic (sentenced to life for genocide on 27 September 1997, see *The Guardian* 27 September 1997), and Dusko Tadic, who was transferred to the Hague.

<sup>29</sup> Canadian legislation was used to investigate Leon Mugesera for genocide in Rwanda, which necessarily would involve a claim of universal jurisdiction. See *The Guardian* 17 August 1994. For an overview of legislation (from the UK, Canada and Australia) that are based on universal jurisdiction see T. Meron, “International Criminalisation of Internal Atrocities” (1995) 89 *A.J.I.L.* 554, at pp.572-4.

<sup>30</sup> Belgian Authorities have been attempting to use their *Loi 16 June 1993 Moniteur Belge* 5 August 1993, which asserts universal jurisdiction over breaches of the Geneva Conventions, in relation to Rwanda. See L. Reydam, “Universal Jurisdiction Over Atrocities in Rwanda: Theory and Practice” (1996) 1 *Eur.J.Crim.Crim.L. & Crim. Just.* 18, pp.35-38.

<sup>31</sup> For a helpful discussion of the cases relating to non international armed conflict, see S. Boeleart-Suominen, “Grave Breaches, Universal Jurisdiction and Internal Armed Conflicts: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for All Armed Conflicts” (2000) 5 *J.C.S.L.* 63.

<sup>32</sup> *Supra* n.20.



war crimes, crimes against humanity and genocide.<sup>33</sup> The matter should no longer really be in doubt.<sup>34</sup>

Thus jurisdiction over international crimes is simple, as universal jurisdiction provides all States with the right to prosecute international crimes, wherever, and by whoever, they are committed. This is in addition to any other heads of jurisdiction which may apply (such as territorial or nationality). The difficulty is determining between the overlapping jurisdictional claims universal jurisdiction creates, as there is no hierarchy established between the forms of jurisdiction. This has been a problem for Tanzania, which has been faced with both Rwanda (the State with territorial jurisdiction) and Belgium (who seek to prosecute on the grounds of universal jurisdiction) seeking the extradition of Ntuyuhaga.<sup>35</sup> It is also, in some ways, what was at issue in the Pinochet litigation, as Chile claimed it should be able to try him,<sup>36</sup> while the “implicit assumption in the Spanish-English effort was that Chile had no protected right” to do so in preference to their courts.<sup>37</sup> Bassiouni is a supporter of the creation of a hierarchy of jurisdictional claims.<sup>38</sup> It would be a sensible, but difficult development,<sup>39</sup> and the problem of overlapping jurisdiction remains.

Although the jurisdictional claim underlying them may have been universal, neither the Nuremberg or Tokyo IMTs were mandated to exercise the jurisdiction in a universal

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<sup>33</sup> This was a the sixth meeting of the UN PREPCOM. See C.K. Hall, “The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court” (1998) 92 *A.J.I.L.* 548 at p. 550.

<sup>34</sup> A secondary argument could be made that to the extent that international crimes are also subject to *jus cogens* prohibitions this could lead to the existence of universal jurisdiction, *Prosecutor v Furundzija*, Judgment, 10 December 1998, IT-95-17/1-T, para 156. *Jus cogens* norms coincide with *erga omnes* obligations, (M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: OUP, 1997) p.50) This supports the idea of the community interest in the suppression of international crimes being converted into a national interest of States for the purposes of jurisdiction. Nonetheless, although the prohibitions on genocide and crimes against humanity are *jus cogens* that is not the case for all war crimes, which are also subject to universal jurisdiction.

<sup>35</sup> See *supra* pp.63-64.

<sup>36</sup> See written submissions of Chile, as reported by Lord Hutton in *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte* [No. 3] [1999] 2 W.L.R. 827, p.900. “The Republic [of Chile] intervenes to assert its own interest and right to have these matters dealt with in Chile... Nor is the purpose to prevent him from being investigated and tried for any crime he is alleged to have committed whilst in office, provided that any investigation and trial takes place in the only appropriate courts, namely those of Chile”.

<sup>37</sup> R. Wedgwood, “International Criminal Law and Augusto Pinochet” (2000) 40 *V.J.I.L.* 829, pp.832-833.

<sup>38</sup> M.C. Bassiouni, “Policy Considerations on Inter-State Cooperation in Criminal Matters” in M.C. Bassiouni (ed.), *supra* n.10, 3, p.9, ranking them territoriality, nationality passive personality, protective and universal.

<sup>39</sup> Blakesley, *supra* n.10, p.82.



manner. Limited to the prosecution of Axis nationals, they were operating on the basis of universal jurisdiction, albeit violating its spirit. The Nuremberg agreement, in conjunction with Control Council Law 10 seemed to overcome the problem of hierarchy for the signatories who were duty bound to make defendants available to the IMT.<sup>40</sup> This “duty” was rendered unworthy of the name by the granting to each occupying power the right to veto the removal of a defendant from their control.<sup>41</sup> The Tokyo Charter did not have this requirement, probably as the US was in effective control of the entire territory of Japan, unlike in Germany where the four occupants all had their respective “zones”.

The ICTY and ICTR both partially exercise what amounts to jurisdiction mandated by the universal principle (in both instances for genocide and crimes against humanity and some war crimes). For some war crimes, those not considered customary but nonetheless applicable to the conflict by virtue of agreements entered into by the parties to the conflict, or adherence to the relevant treaties, jurisdiction is on the basis of nationality or territorial jurisdiction.<sup>42</sup> Like the Nuremberg and Tokyo IMTs they do not have the power to exercise jurisdiction over offences outside the limited areas to which they have been assigned.<sup>43</sup>

Within their jurisdictional limits, the two UN tribunals have gone a long way towards solving the problems of overlapping jurisdiction. This comes from the principle of primacy of the UN tribunals.<sup>44</sup> When either Tribunal wishes to take jurisdiction over an indictee, its jurisdiction trumps that of national jurisdictions,<sup>45</sup> which are obliged to

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<sup>40</sup> 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Power and Charter of the International Military Tribunal, 82 UNTS 279, Article 3.

<sup>41</sup> As discussed in Chapter 2, n.3 Control Council Law 10 gave the signatories a veto over the removal of a defendant from their custody.

<sup>42</sup> For the ICTR this can be seen by the limitation of jurisdiction, for offences committed outside the territory of Rwanda to those of Rwandan nationality (ICTR Statute, Article 1) This does not mean that the ICTR is applying national law, merely international law which, although non-customary, has been expressly consented to by the parties. See V. Morris & M.P. Scharf, *The International Criminal Tribunal for Rwanda* (New York Transnational. 1998) pp. 118-120.

<sup>43</sup> That the ICTY has jurisdiction over the Kosovo conflict must be regarded as a fortuity.

<sup>44</sup> See *supra*, pp.63-67.

<sup>45</sup> Strictly speaking, not quite any, just all UN members and Switzerland. The ICTR in *Prosecutor v Ntuyubagwa*, Decision on the Prosecutor’s Motion to Withdraw the Indictment, 18 March 1999, ICTR-98-40-T, said “the primacy recognised by the statute is clear inasmuch as the Tribunal may request any national jurisdiction to defer investigation or ongoing proceedings”. This is in accordance with its Statute (Article 8).

transfer that person to the relevant tribunal. In cases including the transfer of Dusko Tadic from Germany this has worked well. On other occasions, for example in the case of the “Vukovar three” States have resisted surrender, particularly where the accused are of the holding States’ nationality.

In the “Vukovar three” case, Mile Mrksic, Miroslav Radic and Veselin Sljivancanin were indicted in November 1995 for their alleged roles in the Vukovar Hospital massacre.<sup>46</sup> Following the non-compliance with the arrest warrant by the FRY, a Rule 61 hearing was convened, and an international arrest warrant was issued.<sup>47</sup> The continuing failure of the FRY to transfer the indictees to the ICTY led to an adverse statement from the President of the Security Council directed at the FRY “deplor[ing the] failure... to execute the arrest warrants”.<sup>48</sup> In 1998, pressure increased on the FRY to comply with the various warrants for arrest. This included a full Security Council resolution which “[c]ondemn[ed] the failure to date of the Federal Republic of Yugoslavia to execute the arrest warrants issued by the Tribunal against the three individuals... and demands the immediate and unconditional execution of those arrest warrants, including the transfer to the custody of the Tribunal of those individuals”.<sup>49</sup> In response the FRY initiated investigations into the Vukovar Hospital massacre, and scheduled hearings involving the three suspects. The prosecutor did not consider this to be adequate, as the FRY was duty-bound to pass them to the ICTY for trial. The ICTY Trial Chamber dealing with the case issued a formal request to the FRY to defer its proceedings to them, and transfer the accused to the Hague.<sup>50</sup> This request has gone unheeded. The primacy of the UN Tribunals should, in theory, end the difficulties associated with overlapping jurisdiction, but without having power to enforce its judgments when faced with State contumacy, it is powerless to bring about a practical solution.

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<sup>46</sup> See *Prosecutor v Mrksic, Radic and Sljivancanin*, Indictment, 7 November 1995, IT-95-13.

<sup>47</sup> *Prosecutor v Mrksic et al*, Rule 61 Hearing, 3 April 1996, IT-95-13-R61.

<sup>48</sup> S/PRST/1996/23, 8 May 1996.

<sup>49</sup> S/RES/1207, 17 November 1998.

<sup>50</sup> *Prosecutor v Mrksic et al*. Request to The Federal Republic Of Yugoslavia To Defer The Proceedings Instituted Against Mile Mrksic, Veselin Sljivancanin and Miroslav Radic, 10 December 1998, IT-95-13-T.



The ICTR has had more practical success. Uganda has complained about the fact that the ICTR has primacy over it for crimes under ICTR jurisdiction committed by Rwandans in Uganda,<sup>51</sup> but as a UN member it has no choice but to accept the ICTR's power.<sup>52</sup> Co-operation between the ICTR and States in Africa has been quite good,<sup>53</sup> although at times the ICTR and Rwanda have clashed over defendants they both wish to try.<sup>54</sup> Although their primacy determines priority in the legal sense, practical political considerations have led to compromise solutions. ICTR proceedings have shown the limits on the usefulness of having such prime jurisdiction. There is no possibility that all, or even a large proportion of, international crimes committed in Rwanda or former Yugoslavia could be tried by the relevant international tribunal. This means that smaller violations of the laws of war are not worth pursuing in international tribunals.<sup>55</sup>

This limit could be avoided if the UN tribunals operated as a clearing mechanism. This could take the form of transferring cases which it had investigated, or persons against it had issued indictments, to willing national jurisdictions, who could prosecute such offences applying international law. Appeals relating to international law could be made to the joint Appeals Chamber of the tribunal. There is an analogue to this in the two UN Tribunals themselves. Appeals from the ICTR are made to the ICTY Appeals Chamber. It must also not be forgotten that the ICTY has, for several years, under the "Rules of the Road" Agreement,<sup>56</sup> acted as a reviewing mechanism over cases involving international crimes in Bosnia. All cases involving such offences are meant to be submitted to the ICTY prosecutor, who reviews the evidence to see if there is a *prima facie*

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<sup>51</sup> "The Ugandan Government considers that its judicial system has primary and supreme jurisdiction and competence over any crimes committed on Ugandan territory". Letter Dated 31 October 1994 From the *Charge d'Affaires* A.I. of the Permanent Mission of Uganda to the United Nations Addressed to the President of the Security Council, UN Doc. S/1994/1230.

<sup>52</sup> V. Morris & M.P. Scharf, *The International Criminal Tribunal for Rwanda* (New York: Transnational, 1998) p.296.

<sup>53</sup> See C. Cissé, "The End of a Culture of Impunity in Rwanda" (1998) 1 *Y.B.I.H.L.* 161, pp.169-170.

<sup>54</sup> See M. Morris, "The Trials of Concurrent Jurisdiction: The Case of Rwanda" (1997) 7 *Duke J.C. & I.L.* 349, pp.362-363.

<sup>55</sup> Indeed, they are excluded from the jurisdiction of the tribunals by their limitation to "serious" violations of Common Article 3 and APII (ICTR Statute Article 4) or the laws and customs of war (Article 3 ICTY Statute).

<sup>56</sup> Rome Statement Reflecting the Work of the Joint Civilian Commission, Sarajevo Compliance Conference, 18 February 1996.



case.<sup>57</sup> Unless and until this is certified by the Prosecutor, the authorities are not meant to arrest such persons. Post-*Ntuyuhaga*, it is clear that for indictees in custody at the ICTR, and who have made their initial appearance this would not be possible, although, as discussed in chapter 2, there is no necessary reason for this, and the ICTY has not had complaints about its assertion of an analogous power in Rule of Procedure 11*bis*.

Although this suggestion would seem to be a wide power to grant to the UN tribunals, it must not be forgotten that they have been entrusted with primacy over the offences coming under their jurisdiction. The Tribunals have the power to demand submission to its jurisdiction of any person in effectively every State, and to nullify national proceedings if they deem it falls under the criteria it set out in Rule 9. It would not appear to be an unacceptable additional grant of power to the tribunals, particularly if the proceedings remained under their supervision. This could be achieved by the provision of Appellate jurisdiction to the ICTY Appeals Chamber, and close co-operation between the national jurisdictions and the tribunal, such that the national jurisdiction could be seen as acting as a franchised Trial Chamber for the tribunal, but still within in its system.

The ICC mainly exercises nationality and territorial jurisdiction, based on a cession of jurisdiction from the States parties. This is a severe limitation on the ICC. Some States were highly unwilling to allow the court to exercise universal jurisdiction (particularly over them, if they were to remain non signatories to the Statute). There is a very limited form of universal jurisdiction permitted to the ICC by the Statute. The Security Council can pass any situation to the ICC, irrespective of where it is. Even with this the Court is more limited than States, who are entitled to exercise universal jurisdiction over the core international crimes by no body's leave. The ICC will probably not make any difference to the existence of overlapping jurisdiction, because it is meant to operate only if national jurisdictions are not doing so. The ICC can only take a case if certain jurisdictions are

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<sup>57</sup> Admittedly, cases are not always submitted there, see R.,Wedgwood, "National Courts and the Prosecution

“unwilling or unable” to do so themselves. Precisely which States these are is a matter of uncertainty, and if any of these are involved, then the Court cannot act.<sup>58</sup> If none of these are actively pursuing the matter, under certain conditions the Court’s transfer request is given priority (discussed above, pp.76-77). Here a hierarchy is set up by which the Court’s Statute solves the problem of overlapping jurisdictions. This is the exception, not the rule, and unlike the UN Tribunals, it cannot request a suspect, then decide what to do with him.

### IMMUNITIES FROM JURISDICTION

There are two types of immunity from jurisdiction of national courts: State immunity (also known as immunity *rationae materiae*) and personal immunities such as diplomatic or head of State immunity (also known as immunity *rationae personae*). The former has recently returned to the centre of debate because of the Pinochet cases. Although strictly speaking, immunity *rationae materiae* and *rationae personae* both emanate from the concept of the State, this thesis follows the usual convention of using the term “State immunity” to refer to immunity *rationae materiae*.

#### IMMUNITY *RATIONAE MATERIAE*

It is here that the conflicting imperatives of the ideas of sovereignty and the challenges of international crimes clash. The idea that State activities are immune from the jurisdiction of foreign States stems from the bilateralist mantra *par in parem non habet imperium*. This conflicts with the newer values in ascendancy in the international system, that posit the need for prosecutions of such offences. The better view is that sovereignty gives way, creating an exception to State immunity where international crimes are at stake. Prosecutions of war crimes have been undertaken by States for centuries, both of their

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of War Crimes” in Kirk-McDonald & Swaak-Goldman (eds.), *supra* n.3, 389, p.406.

<sup>58</sup> See *supra* pp.75-76.



own nationals (where State immunity would not apply) and of foreign nationals (where it would). The initiation and execution of an armed conflict has always been considered a sovereign act, but prosecutions of members of foreign armed forces have always proceeded upon the assumption that State immunity does not apply.<sup>59</sup> The same would apply to genocide and crimes against humanity, as, for the most part, these are crimes carried out by, or at the instigation of, States.<sup>60</sup> The major dissenter from this view was Hans Kelsen, who asserted that to avoid the application of the doctrine of State immunity preventing trial, a treaty had to be in force allowing such prosecutions.<sup>61</sup> This view cannot account for the prosecutions of international crimes to date.

The legal position is summed up in the Supreme Court of Israel's judgment in the *Eichmann* case: "international law postulates that it is impossible for a State to sanction an act that violates the core of the concept of 'international crime'... If it were otherwise the penal provisions of international law would be a mockery".<sup>62</sup> This conclusion was adopted by Lord Nicholls in the first *Pinochet* appeal to the House of Lords, when he averred "international law has made plain that certain types of conduct, including torture... are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else: the contrary conclusion would make a mockery of international law."<sup>63</sup> Lord Steyn, despite some doubts expressed, which

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<sup>59</sup> If it were not so, Article 85 of Geneva Convention III, which provides that prosecutions for pre-capture violations of the law of war are possible, would be made a nonsense.

<sup>60</sup> It is also supported by the Nuremberg Principles adopted by the ILC, that "Principle 1: Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment... Principle IV the fact that a person acted pursuant to an order of his government... does not relieve him from responsibility under international law" (1950) 2 *Y.B.I.L.C.* p.374.

<sup>61</sup> H. Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals" (1943) 31 *Cal.L.R.* 530, pp.552-553. It could also be the Quincy Wright adhered to this view, see Q. Wright, "The Scope of International Criminal Law: A Conceptual Framework" (1975) 15 *V.J.I.L.* 561, pp.571-572, but he is vague on this point, accepting that in the US courts martial can prosecute very high level officers, but then claims (*ibid.*) that the limits on national courts require international tribunals. Given his earlier writings, he probably accepted that State immunity did not apply, but was referring to the Anglo-American Act of State doctrine, which urges judicial caution in this area. For his earlier writings see Q. Wright, "War Criminals" (1945) 39 *A.J.I.L.* 257, p.266, "an act of government is not an 'act of state' when it attempts to authorize an individual to do something beyond the competence of the state in international law", Q. Wright, "The Law of the Nuremberg Trial" (1947) 41 *A.J.I.L.* 38, p.71.

<sup>62</sup> *A-G of Israel v Eichmann*, *supra* n.17, Supreme Court, p.310.

<sup>63</sup> *Pinochet* 1<sup>st</sup> appeal, *supra* n.22, pp.939-940. On this appeal see H. Fox, "The First *Pinochet* Case: Immunity of a Former Head of State" (1999) 49 *I.C.L.Q.* 207; N. Boister & R. Burchill, "The *Pinochet* Precedent: Don't Leave Home Without It" (1999) 10 *Crim. L.F.* 405, pp.409-413.



appear to relate to conspiracy,<sup>64</sup> said “the development of international law since the second world war justifies the conclusion that...international law condemned genocide...[and crimes against humanity]...as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of head of state... [thus entitling Pinochet to State immunity].”<sup>65</sup>

The result that international crimes are not subject to the normal rules of State immunity is correct, although their Lordships means of deciding this, by declaring the acts not “official” has been criticised by some, as flying in the face of reality.<sup>66</sup> But we are not dealing with (civil) State responsibility here, but individual criminal responsibility and immunity. The two are different, thus the attribution of the offences to the State for the purposes of State responsibility, and the existence of individual criminal responsibility not subject to State immunity is not inconsistent.<sup>67</sup> It is true that the Lords, in both the 1<sup>st</sup> and 3<sup>rd</sup> appeals did not look into the implications of their judgment for State responsibility.<sup>68</sup> There is a simple reason for that, they drew a distinction between civil (State) responsibility and (individual) criminal liability.<sup>69</sup>

That the imposition of responsibility on both the State and individual need not be inconsistent (i.e. that international crimes may be official acts for the purposes of State responsibility, but that their official nature does not give immunity from individual

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<sup>64</sup> Fox, *ibid.*, p.214 expresses the opinion that his opinion was limited by the fact that the DINA was personally responsible to Pinochet, not to him *qua* head of State. Boister & Burchill, *ibid.*, pp.438-439 prefer the view that this is likely to refer more to conspiracy, and would not exclude, for example, command responsibility. What Steyn was concerned about was allegations based purely on position, as opposed to based on the usual principles of international criminal liability. Fox’s view seems inconsistent with the passage in the judgment cited above.

<sup>65</sup> *Pinochet*, 1<sup>st</sup> appeal, *supra* n.22, p.939.

<sup>66</sup> J.C. Barker, “The Future of Former Head of State Immunity After *Ex Parte Pinochet*” (1999) 48 *I.C.L.Q.* 937.

<sup>67</sup> This may explain B.J. George Jr.’s, comment that “Obviously, problems of sovereign immunity are of only peripheral concern in criminal justice administration” B.J. George Jr., “Immunities and Exceptions” in M.C. Bassiouni (ed.), *supra* n.10, 107, p.109.

<sup>68</sup> See E. Denza, “*Ex Parte Pinochet*: Lacuna or Leap?” (1999) 48 *I.C.L.Q.* 949, p.954.

<sup>69</sup> See, for example in the 3<sup>rd</sup> appeal, Lord Phillips, *supra* n.36, p.916, “we are not, of course concerned with a civil suit but with proceedings that are criminal in nature. Principles of the law of immunity that apply in relation to civil litigation will not necessarily apply to a criminal prosecution, Lord Hutton, *ibid.*, p.892. This distinction is also drawn by Dinstein, Y. Dinstein, “Defences” in McDonald & Swaak-Goldman (eds.), *supra* n.3, 369, p.386.

criminal responsibility) can be implied from the oft-cited statement (by the House in both appeals) of Sir Arthur Watts. Watts noted that “for international conduct which is so serious as to be tainted by criminality *to be regarded as attributable as only to the impersonal state and not to the individuals who ordered or perpetrated them is both unrealistic and contrary to common notions of justice*” [emphasis added].<sup>70</sup> It is clear that Watts considers the two to be cumulative, and consistent. Lord Hutton adopted a similar approach.<sup>71</sup>

The majority in the 3<sup>rd</sup> appeal though did not use the simple (and, it is submitted, largely correct) analysis of Lord Nicholls, that international crimes are not subject to State immunity rules when individual criminal responsibility is at issue, and got themselves into all sorts of trouble.<sup>72</sup> Most of the Lords relied on a curious mixture of customary international law (relating to international crimes in the narrow sense in which this thesis uses the term) and the Torture Convention,<sup>73</sup> although the Torture Convention seemed the more important to them.<sup>74</sup> Lord Browne-Wilkinson, in particular, was incapable of distinguishing an individual act of torture, as a creature of the Torture Convention from torture as a modality for the commission of a crime against humanity.<sup>75</sup> Only 2 of the 7 Lords in the 3<sup>rd</sup> appeal, Lord Hutton and Lord Millett were prepared to assert that State

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<sup>70</sup> A. Watts, “The Legal Position in International Law of heads of States, Heads of Governments and Foreign Governments” (1994) III 247 *R.d.C.* 9, p.82.

<sup>71</sup> *supra* n.36, p.901, relying on Article 4 of the ILC Draft Code of Crimes, UN. Doc. A/51/10 (1996). Millett could have added that the commentary to article 7 of the Draft Code supports his position, “it would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the code to invoke the sovereignty of the State and hide behind the immunity that is conferred on them by virtue of their positions” (1988) 2 *Y.B.I.L.C.* p.71.

<sup>72</sup> See C.A. Bradley & J.L. Goldsmith, “*Pinochet* and International Human Rights Litigation” (1999) 97 *Mich. L.R.* 2129, p.2140, their reasons are “unclear and often contradictory”; A. Bianchi, “Immunity Versus Human Rights: The Pinochet Case” (1999) 10 *E.J.I.L.* 237, p.243, the decision was “lengthy and rather convoluted”; Boister & Burchill, *supra* n.63, p.405 it was “fraught with... legal confusion”. For a strongly worded critique see H. Fox, “The Pinochet Case No. 3” (1999) 48 *I.C.L.Q.* 687.

<sup>73</sup> 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Resolution 39/46. UN Doc. A/39/51, (1986) 24 *I.L.M.* 1027.

<sup>74</sup> See Fox, *supra* n.72, p.692.

<sup>75</sup> See, for example, *supra* n.36, p.832, “Since the Nazi atrocities and the Nuremberg trials, international law has recognised a number of offences as being international crimes... The most important of such international crimes for present purposes is torture which is regulated [by the Torture Convention]”. This also seemed to be a mistake made by Lord Hutton, who appeared to think that the Torture convention made single acts of torture international crimes like crimes against humanity (*ibid.*) pp.900-901, Boister & Burchill, *supra* n.63, p.422. Lord Hope also did this, although his position was opposite to that of Browne-Wilkinson, who believed that there was immunity until the convention, even though torture was an international crime prior to the convention (*ibid.*, p.847) (see Boister & Burchill, *ibid.*, pp.415-418). Lord Hope believed that there would be immunity under the convention, except when it was a crime against humanity (*ibid.*, p.885), see Bradley & Goldsmith, *supra* n.72, p.2145. Lord Saville relied solely on the Torture Convention *ibid.*, p.903.



immunity did not apply in criminal proceedings relating to international crimes.<sup>76</sup> Nonetheless, it is their view which is to be preferred.

The dissenters in both appeals (Lords Slynn and Lloyd in the 1<sup>st</sup>, Lord Goff in the 3<sup>rd</sup>) drew a distinction between international and national tribunals on this point. They all maintained that State immunity was not applicable before international tribunals, but that it was before national tribunals.<sup>77</sup> This argument cannot stand for three reasons. The first is that it does not explain the prosecutions before national tribunals that have occurred (a point not lost on Lord Millett).<sup>78</sup> Second, as Millett noted, the Allies claimed merely to be exercising jointly the powers that they could have asserted singularly (thus in national courts).<sup>79</sup> A final, and determinative reason relates to the later international tribunals, the ICTY, ICTR and ICC. None of the courts are intended to have exclusive jurisdiction. Both the ICTY and ICTR Statutes anticipate that national courts will prosecute such offences. The ICC, in particular, supports this assertion, since it is based on the notion of complementarity, which means it is meant to promote the national prosecutions of such offences. The concurrence of jurisdictions as envisaged by the current international tribunals therefore undercuts the assertion of the dissenters.

As with jurisdiction, there is a secondary argument based on *jus cogens*. The argument here, although none of the Lords in the *Pinochet* appeals was prepared to rely on it alone,<sup>80</sup> is simple. *Jus cogens* rules, being hierarchically superior to other rules “trump” them when they conflict. As the rules of State immunity could conflict with a prosecution of a violation of a *jus cogens* rule, the former is inapplicable.<sup>81</sup> The argument is limited to those international crimes which are *jus cogens*, so it cannot be a full explanation why all international crimes are unaffected by the usual rules of State immunity.

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<sup>76</sup> Hutton, *ibid.*, p.901; Millett, *ibid.*, pp.907-910. This is also the view of Dinstein, *supra* n.69, pp.384-386.

<sup>77</sup> Slynn, *supra* n.22, p.913; Lloyd, *supra* n.22, p.930; Goff, *ibid.*, p.853.

<sup>78</sup> Millett, *ibid.*, p.908.

<sup>79</sup> Millett, *ibid.*, p.908, see also chapter 2, pp.26-28.

<sup>80</sup> On the use of *jus cogens* in *Pinochet* see M. Byers, “The Law and Politics of the Pinochet Case” (2000) 11 *Duke J.C. & I.L.* 415, p.436.

<sup>81</sup> See Bianchi, *supra* n.72, pp.262-265.



International courts, beginning with the Nuremberg IMT, have all rejected any State immunity arguments. The most famous of these was the *ultra vires* argument of the Nuremberg IMT. In response to claims that the defendants before it were entitled to State immunity for their crimes and thus Article 7 of the Nuremberg IMT Charter was illegal,<sup>82</sup> the IMT responded: “he who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorising such action moves outside its competence in international law.”<sup>83</sup> This was agreed with by the Tokyo IMT,<sup>84</sup> and is correct insofar as it refers to actions criminalised by international law. The Nuremberg IMT comment on this point was taken up, *inter alia*, by the Supreme Court of Israel in the *Eichmann* case.<sup>85</sup> Thus its pronouncement was of assistance in clarifying the point, or, according to some, establishing it.<sup>86</sup> By the time of the ICTY and ICTRs’ creation, when their statutes reaffirmed “the official position of any accused person, whether as head of States or government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment”,<sup>87</sup> the matter was beyond doubt. This made Article 27(1) of the Rome Statute fairly uncontroversial. This provision reads “this Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or government, a member of a Government or Parliament, an elected representative or a Government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence”.<sup>88</sup> The extensive reliance on these provisions by the House of

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<sup>82</sup> Article 7 of the Nuremberg IMT Charter states: “the official position of defendants, whether as heads of State or responsible officials of government departments shall not be considered as freeing them from responsibility”.

<sup>83</sup> Nuremberg IMT Judgment, (1947) 41 *A.J.I.L.* 172, p.221. For support of the position of the Nuremberg IMT here, see R.K. Woetzel, *The Nuremberg Trials in International Law* (London: Stevens, 1962) pp.68-76; H. McCoubrey, “The Concept and Treatment of War Crimes” (1996) 1 *J.A.C.L.* 121, pp.125-126.

<sup>84</sup> R.J. Pritchard & S.M. Zaide (eds.), *The Tokyo War Crimes Trial Vol. 20: Judgment* (New York: Garland, 1981) p.48,439.

<sup>85</sup> *Supra* n.17 p.311.

<sup>86</sup> W.V. O’Brien, “The Nuremberg Precedent and the Gulf War” (1991) 31 *V.J.I.L.* 391, pp.393-394.

<sup>87</sup> ICTY Statute, Article 7(2), ICTR Statute, Article 6(2).

<sup>88</sup> See P. Saland, “International Criminal Law Principles” in R.S. Lee (ed.), *The International Criminal Court* (The Hague: Kluwer, 1999) 189, p.202; and generally O. Triffterer, “Article 27” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999) 501.

Lords in the 3<sup>rd</sup> *Pinochet* appeal is a testament to their importance in entrenching the absence of State immunity for international crimes.<sup>89</sup>

#### IMMUNITY *RATIONAE PERSONAE*

There is another set of immunities which are relevant. These are personal immunities from jurisdiction of States. There are three major types of personal immunities. Diplomatic immunity, Head of State immunity and those granted pursuant to agreements such as Status of Forces Agreements. Such immunities have had a greater impression on national jurisdictions than State immunities, although there is no reason in principle why this should be.

Diplomatic agents (and their families)<sup>90</sup> enjoy immunity from the criminal jurisdiction of the “receiving State” (the State to which they are sent as diplomats), and, with limited exceptions, to its civil and administrative jurisdiction too.<sup>91</sup> There are limits to immunities though, they relate only to the jurisdiction of receiving States and, whilst they are *en route* to or from that State, those States through which they travel.<sup>92</sup> Diplomatic immunities also come to an end when the person’s posting comes to an end and they leave the receiving State, or a reasonable time after they cease to perform their diplomatic functions if they do not leave the receiving State.<sup>93</sup> Heads of State have similar personal immunities to diplomats,<sup>94</sup> they are absolutely immune from legal process in all foreign States.<sup>95</sup> Although there are fewer Heads of State than diplomatic agents, Heads of State are entitled to immunity in all States. This immunity comes to an end when the Head of

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<sup>89</sup> See *supra* n.36, pp.840 (Lord Browne-Wilkinson), pp.852-853 (Lord Goff), pp.895-897 (Lord Hutton), pp.908-909 (Lord Millett), p.924 (Lord Phillips).

<sup>90</sup> 1961 Vienna Convention on Diplomatic Relations 500 UNTS 95, Article 37.

<sup>91</sup> Vienna Convention, Article 31(1). On immunities generally, see George, *supra* n.67. On the Convention see E. Denza, *Diplomatic Law* (Oxford: OUP, 2<sup>nd</sup> ed. 1998).

<sup>92</sup> Vienna Convention, Article 40.

<sup>93</sup> Vienna Convention, Article 39(2). This is also the case if they do not leave in a reasonable time after being declared *persona non grata*, Vienna Convention, Article 9(2).

<sup>94</sup> See *Pinochet* 3<sup>rd</sup> appeal, *supra* n.36, p.844 “immunity enjoyed by a head of state in power and an ambassador is a complete immunity attaching to the person of the head of state or ambassador.”

<sup>95</sup> *Ibid.*, p.845 (Lord Browne Wilkinson), p.905 (Lord Millett).



State stands down.<sup>96</sup> The third type of immunities arise under Status of Forces Agreements, where on occasion, States agree to exempt members of foreign armed forces stationed in their territory from aspects of their criminal jurisdiction for the period of their duties.<sup>97</sup> The most well known agreement of this nature, the NATO Status of Forces Agreement,<sup>98</sup> allows concurrent jurisdiction over offences criminalised by both the sending and receiving State, but gives priority to the sending State where the act is done as part of official duties.<sup>99</sup> It is uncertain whether the *Pinochet* type of reasoning (that international crimes are not part of an offender's official duties) could apply here. If it did, priority in jurisdiction would reside in the territorial State.

Diplomatic and Head of State immunities, it is traditionally thought, prevent national courts exercising jurisdiction over any offence, be it criminalised by national or international law. There are three authorities for this position. The first (chronologically) is the French case of *Abetz*,<sup>100</sup> in which it was accepted that a properly accredited diplomat could not be prosecuted for a war crime. It was a little ambiguous, as the defendant was not so accredited, and the Court held that the national law under which the defendant was prosecuted excluded any ground preventing prosecution. More recently, in 1997, the German Constitutional Court, in *in re Former Syrian Ambassador to the German Democratic Republic*<sup>101</sup> said "diplomatic immunity from criminal prosecution basically knows no exception for particularly serious violations of law."<sup>102</sup> It continued, referring particularly to international crimes: "exemptions from immunity for cases of war criminals, violations of international law have been discussed as developments of this rule... .However, as the wording of article 7 of the Charter of the International Military Tribunal at Nuremberg makes clear, these exceptions are relevant only to the applicable

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<sup>96</sup> See *ibid.*, p.845 (Lord Browne Wilkinson), p.905, Lord Millett, "this [personal immunity] is not in issue in the present case...If he were, he could not be extradited. It would be an intolerable affront to the Republic of Chile to arrest him or detain him."

<sup>97</sup> On these see George, *supra* n.67, pp.134-142.

<sup>98</sup> 1951 Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces 199 UNTS 67. (Hereinafter NATO SOFA).

<sup>99</sup> NATO SOFA, Article VII.

<sup>100</sup> French *Cour d' Cassation* 28 July 1950, noted in "International Decisions: Abetz" (1952) 46 *A.J.I.L.* 161.

<sup>101</sup> Case No. 2 BvR 15/16/96, unreported, quotations are as given in the 3<sup>rd</sup> *Pinochet* appeal, *supra* n.36.



law of state immunity...and not to diplomatic immunity.”<sup>103</sup> Their interpretation of Article 7 is not necessarily correct. Article 7 and its progeny have been taken to refer to diplomatic or head of State immunity, and it is not clear why Article 7 (given below) is “clear” that it does not apply to diplomatic or Head of State immunities. Still, the approach that diplomatic or Head of State immunities act to prevent a State subject to such immunities from acting upon allegations of international crimes was adopted unanimously by the House of Lords in both *Pinchet* appeals.<sup>104</sup>

These cases go to show that although sovereignty has given way to the values protected by international crimes in the context of State immunity, it has not done so for the rules of Head of State and diplomatic immunity. This may extend to immunities where they are granted by SOFAs.<sup>105</sup> It is uncertain why this is the case, as the rules involved are, like the rules of State immunity, normal rules of international law. They are not *jus cogens*. Indeed, the *jus cogens* arguments canvassed above under the heading of immunity *rationae materiae* are equally applicable to the immunities here, and it is at least arguable that for international crimes where the prohibition has the status of *jus cogens*, this would indeed trump the immunities discussed.<sup>106</sup> For SOFAs, the same problems may not arise as discussed above, the exclusion of official acts may not apply here, leaving priority in jurisdiction to the territorial State.

Personal immunities have not caused problems for international tribunals. The precedent was set by the London Charter, Article 7 of which provides, “the official position of defendants, whether as Heads of State or responsible officials of government departments shall not be considered as freeing them from responsibility”. This could have been invoked in the Nuremberg IMT’s prosecution of Admiral Dönitz, as he was the notional successor to Hitler as the Head of the German State. In practice it was

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<sup>102</sup> *Ibid.*, cited *ibid.*, p.894.

<sup>103</sup> *Ibid.*, p.895.

<sup>104</sup> See for example, Lord Millett, *supra* n.96.

<sup>105</sup> This is the implication of Article 98 of the Rome Statute.

<sup>106</sup> Denza, *supra* n.68, p.954 notes that the arguments they use on immunity *rationae materiae* can equally apply to *rationae personae* immunities. See also Bradley & Goldsmith, *supra* n.72, p.2144; Bianchi, *supra* n.72, p.261.

unnecessary to rely on Article 7, as the government had collapsed and no one considered the Dönitz regime to be a government, or Dönitz a Head of State.<sup>107</sup> Article 6 of the Tokyo Charter was similar (although not identical to) Article 7 of the London Charter.<sup>108</sup> The issue arose in the Tokyo IMT, when the Ambassador Oshima asserted his status as a diplomat to claim immunity from the jurisdiction of the tribunal.<sup>109</sup> The Tokyo IMT rejected this claim, on the basis that as it was an international tribunal, there was no immunity.<sup>110</sup> This is interesting, as unlike in the case of State immunity, here it would appear that the Tokyo IMT argued that there is a difference between international and municipal courts. It is possible, that for diplomats, this makes sense. As the prosecution argued in the Tokyo proceedings, the Tokyo IMT was not the municipal jurisdiction of a State to which Oshima was sent as a diplomatic agent, thus he was not immune from proceedings.<sup>111</sup> It would not operate to negate Head of State immunity however, and both the Nuremberg and Tokyo IMT Charters refused this form of liability. This adds to the case for recognising the non-immunity *rationae personae* for international crimes, but given the total absence of rejections of immunity on this ground in domestic courts, it cannot be said to be the accepted position in national courts.

Article 7(2) of the ICTY Statute, Article 6(2) of the ICTR Statute and Article 27 of the Rome Statute all exclude reliance on personal or State immunities.<sup>112</sup> It can safely be

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<sup>107</sup> H. McCoubrey, "War Crimes Jurisdiction and a Permanent International Criminal Court: Advantages and Difficulties" (1998) 3 *J.A.C.L.* 9, p.14.

<sup>108</sup> Tokyo IMT Charter, Article 6 "Neither the Official position, at any time, of an accused, nor the fact that an accused acted pursuant to an order of a superior shall... be sufficient to free such accused from responsibility... but such circumstances may be considered in mitigation of punishment". The differences are that it may be taken as mitigation, a provision which may have been put in to assist the Emperor should he have been brought to trial, although the omission of the express reference to "Head of State" which was contained in the Nuremberg formulation would also appear to be a concession to the emperor, see Watts, *supra* n.70, p.83; O. Triffterer, "Article 27", in Triffterer (ed.), *supra* n.88, 501, p.503.

<sup>109</sup> For discussion, see Tokyo IMT proceedings, *supra* n.69, pp.40,541 (prosecution theory that immunity is merely from municipal criminal jurisdiction, not crimes against international law), 43,594 (*ibid.*), 47,607-47,126 (defence claim that he enjoyed complete immunity in accordance with international law), 48,394-396 (prosecution rebuttal that here the issue was international crimes, and not municipal jurisdiction of the diplomat's accredited State).

<sup>110</sup> Tokyo IMT Judgment, reprinted in Pritchard & Zaide, *ibid.* p.49,824.

<sup>111</sup> *supra* n.109.

<sup>112</sup> Article 7(2) of the ICTY Statute, (with which Article 6(2) of the ICTR is Statute identical) reads, "The official position of an accused person, whether as head of State or government or as a responsible government official, shall not relieve a person of criminal responsibility nor mitigate punishment". Article 27 of the Rome Statute is more detailed: "1.This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a



said that there are no procedural immunities for defendants before international tribunals.<sup>113</sup> Both the UN Tribunals and the Rome Statute rely on State proceedings to obtain custody over putative defendants, and before these proceedings immunities may be raised. It may be necessary to establish jurisdiction to arrest and transfer the person, and, of course, personal immunities may prevent such jurisdiction attaching.<sup>114</sup>

For the UN Tribunals, joint rule of procedure 58 considers national law to be inapplicable, but what is being dealt with here is more fundamental: an absence of jurisdiction, based on an immunity deriving from international law. It is possible that the UN Tribunals can validly require States to transfer diplomats and others with immunity even in the face of an apparent international legal obligation to exempt them from jurisdiction. This obligation comes from Article 103 of the UN Charter, which demands that obligations incurred under the Charter (including those created by Security Council resolutions) take precedence over other treaty obligations.<sup>115</sup> Therefore, unless the rules concerned were *jus cogens*, immunities would be trumped by the obligations in Resolutions 827 and 955 to co-operate with the UN Tribunals. In practice, persuading States to do this could be difficult.

The Rome Statute takes a very different track. Article 98 prevents the ICC from asking States to act inconsistently with other rules of international law.<sup>116</sup> The ICC cannot proceed with a request that could require the requested State to act inconsistently with immunities stemming from international law, be they diplomatic immunities, or those

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person from criminal responsibility under this Statute nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

<sup>113</sup> A practical confirmation of this can be seen in the indictment of Slobodan Milosevic, a serving head of State, in 1999. *Prosecutor v Milosevic et al*, Indictment, 24 May 1999, IT-99-37.

<sup>114</sup> This, as will be seen, is the position taken by the Rome Statute, (Article 98).

<sup>115</sup> This would probably also apply, by analogy, to customary norms.

<sup>116</sup> “1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.



based, for example on Status of Forces Agreements.<sup>117</sup> The only difference between surrender to the ICC and other proceedings is that national law immunities, which have no basis in international law, will not be applicable.<sup>118</sup> Although State immunities are not relevant to international crimes,<sup>119</sup> personal immunities may undercut the co-operation regime.<sup>120</sup> For example, Heads of State could not be transferred to the ICC under the normal regime of surrender, unless by their home State, a highly unlikely scenario. Removal of such immunities before national tribunals, even for the purposes of surrender, is still taboo for States.<sup>121</sup> With the wide mandate given in Article 98(2) to States to negotiate agreements allowing immunity, this is a loophole created to be exploited. The only possible way around this problem for States party to the Rome Statute, would be if the Court interpreted its powers to issue orders under Chapter 9 of the Statute to include the power to demand waiver of immunity by the sending State of the immune person. This may be possible under Article 93(1)(l), but as of yet, it is too early to tell whether or not the ICC will risk goodwill from States party to the Statute by requiring them to waive their representatives' immunity.

## A DUTY TO EXTRADITE OR PROSECUTE?

The question of whether or not there is an actual duty to extradite or prosecute those suspected of international crimes, is a fundamental one. The answer to this needs to be dealt with both for treaty and customary obligations. First, by treaty, it is clear that for

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2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender." See K. Prost & A. Schlunck, "Article 98" in Triffterer, *supra* n.88, 1131.

<sup>117</sup> See *supra* pp.76-79, where this is criticised.

<sup>118</sup> See Prost & Schlunck, *supra* n.116, p.1132, D. Sarooshi, "The Statute of the International Criminal Court" (1999) 48 *I.C.L.Q.* 387, pp.390-393.

<sup>119</sup> See above, pp.103-109.

<sup>120</sup> As Sarooshi, puts it *supra* n.118, p.392, "some official capacities may allow a State to exempt itself from an obligation to co-operate with the Court".

<sup>121</sup> J.C. Barker, *supra* n.66, pp.944-945.

Grave Breaches of the Geneva Conventions, there is a duty to either prosecute an offence or extradite the offender to another jurisdiction willing to prosecute. This is clear from the obligatory language of the Grave Breach provisions, which states “[e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and shall bring such persons, regardless of their nationality, before its own courts [or hand them over to another High Contracting Party]”.<sup>122</sup> As the Genocide Convention does not mention trials before national courts other than those with territorial jurisdiction, strictly it has no application outside this sphere, but for those courts it is clear that there is a duty to prosecute.<sup>123</sup> As there is no treaty directly dealing with crimes against humanity there is no treaty based duty to prosecute. However, for both genocide and crimes against humanity involving torture, there is a duty to prosecute acts of torture under the heads of territorial, nationality and passive personality jurisdiction placed on signatories to the Torture Convention.<sup>124</sup> Parties to the Rome Statute may have accepted an obligation to prosecute international crimes occurring on their territories or by their nationals.<sup>125</sup>

The question must arise, for all crimes, of whether there is a generally applicable customary obligation to prosecute such offences. Problems arise, in particular for genocide and crimes against humanity. Neither has a treaty provision involving mandatory assertion of universal jurisdiction like those in the Geneva Conventions, so any obligation must be free standing. The General Assembly has promulgated resolutions

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<sup>122</sup> *Supra* n.3.

<sup>123</sup> Articles IV and VI are both phrased in the mandatory “shall be” tried and punished.

<sup>124</sup> Torture Convention, Article 5, although individual acts of torture are not, of course international crimes, but national crimes mandated by the Torture Convention.

<sup>125</sup> The preamble to the Rome Statute “Recall[s] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” (preambular paragraph 6). M. Bergsmo & O. Triffterer, “Preamble” in Triffterer (ed.), *supra* n.88, 1, p.13 note that the phrase relating to whether it was universal or territorial/national jurisdiction was deliberately left ambiguous. This probably reflects an absence of consensus on the existence of a duty, rather than on the absence of universal jurisdiction. See also T.N. Slade & R.S. Clark, in Lee (ed.), *supra* n.88, 421, pp.427, who refer to it as “delightfully ambiguous”, but note that it reflects the ambiguity of earlier debates that relate to the jurisdictional consents the ICC has to have to operate. Given that, as will be seen, the Rome Statute creates a type of prosecution obligation on the territorial or nationality States, it is more consistent to read the preamble as reflecting the obligation to prosecute offences by those States, rather than an all encompassing duty. In any event, it can only bind signatories to the Rome Statute.



with relevance to the possibility of a duty.<sup>126</sup> The most important of these, Resolutions 2840 and 3074, could be thought to give rise to a duty. Resolution 2840 states that refusal to co-operate in the arrest, extradition, trial and punishment of persons accused of international crimes is contrary to the purposes of the UN Charter and international law. Resolution 3074 builds on this, and is worth quoting at length.

“1. War Crimes and Crimes Against Humanity, wherever they are committed, shall be subject to investigation and...[perpetrators]...*shall* be subject to tracing, arrest, trial and, if they are found guilty, to punishment.

2. Every State has the *right* to try its own nationals for war crimes and crimes against humanity.

5. Persons...[suspected of such crimes]...*shall* be subject to trial...as a general rule in the countries in which they have committed these crimes” (emphasis added).

It is, of course, axiomatic that General Assembly Resolutions are not, in themselves, an independent formal source of law. They may, however, act as evidence, for example of practice or *opinio juris*,<sup>127</sup> or alter the way in which States view their rights and obligations thus catalysing change.<sup>128</sup> A succinct elaboration of the status of General Assembly Resolutions was recently given by the ICJ in the *Legality of Nuclear Weapons Opinion*:

“General Assembly Resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly Resolution, it is necessary to look at

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<sup>126</sup> GA Resolution 2840, UN Doc. A/8429 p.88; GA Res 3074, UN Doc. A/9030 p.78.

<sup>127</sup> See generally, B. Sloane “General Assembly Resolutions Revisited” (1987) 58 *B.Y.B.I.L.* 39; D.J. Harris, *Cases and Materials on International Law* (London: Stevens, 5th ed. 1998) pp.58-64 and literature cited therein; A useful recent treatment is V. Degan, *Sources of International Law* (The Hague: Kluwer, 1997) pp.194-200.

<sup>128</sup> See M. Bos, “The Recognised Manifestations of International Law” (1977) 20 *G.Y.B.I.L.* 9, pp.65-70.



its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character”.<sup>129</sup>

Opinion differs on the effect of these Resolutions. Some commentators, such as Jordan Paust consider the Resolutions to be constitutive of a duty to extradite or prosecute,<sup>130</sup> others consider them as merely evidence of an emerging customary rule.<sup>131</sup> Therefore it is worthwhile examining the issue. The resolution is phrased in the imperative, at least at some points, (“perpetrators “shall” be subject to trial, however, national States have the “right” to try them”). Thus the wording could be taken to imply a duty, albeit not unambiguous, not least as principle 5 implies that any duty may be limited to the State where the crimes were committed. It is also noteworthy that whilst it recalls Resolution 2840, it does not expressly say it is declaratory of international law, it merely “proclaims” the principles.

The voting patterns are instructive. There were 94 positive votes and no votes against. There were also 29 abstentions, thus the Resolution cannot be said to be unambiguously supported by the entire international community. This level of abstention may be dismissable if the rule relying on it is permissive, however, if the rule consists of a mandatory positive demand, this voting pattern must raise an impediment to an hasty assertion of its customary nature.

Perhaps the best evidence of its customary nature, or if it has altered State perceptions of pre-existing international law, is if States have acted as if they are under a duty to prosecute, by initiating proceedings. With one possible exception, (Ethiopia),<sup>132</sup> there is no evidence of any State practice confirming prosecution as a customary duty rather than a right. Even the most ardent supporters of such a duty are forced to concede

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<sup>129</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996) I.C.J. Rep 4, pp.254-5, para 70.

<sup>130</sup> J. Paust, *International Law as Law of the United States* (Durham: N.C., Carolina A.P., 1996) p.405.

<sup>131</sup> M.P. Scharf, “National Prosecutions: Report of the Rapporteur” in Joyner (ed.) *supra* n.11, 125, p128.

<sup>132</sup> See J.Y. Mayfield, “The Prosecution of War Crimes and Respect for Human Rights: Ethiopia’s Balancing Act” (1995) 9 *Emory I.L.J.* 553 at p.570.

this point,<sup>133</sup> and this would also seem to show that after the Resolutions there has not been any alteration in the way States have perceived their international legal obligations. The view that they do not represent positive international law is correct, which is also supported by a large body of secondary literature.<sup>134</sup> If there is a duty to extradite or prosecute, then it must be found elsewhere in international law.

It may be that there are other places from which a duty may arise. The first is human rights law. Since States have a duty to “respect and ensure”<sup>135</sup> the rights granted in the various human rights conventions, it could be that the latter clause implies a duty to prosecute certain serious violations of human rights. All acts constituting genocide and crimes against humanity would be serious violations of human rights obligations, as would most war crimes. There is some support for this position in the practice of the UN Human Rights Committee, the European Court and Commission of Human Rights and from the famous *Velasquez-Rodriguez* Case before the Inter-American Court of Human rights.<sup>136</sup>

In the *Velasquez* case they held that a violation of the right to life had occurred, and as part of the violation of the right was the failure to “ensure” the right to life by investigating and punishing those responsible.<sup>137</sup> On the other hand, Scharf warns against over interpreting these cases for three reasons: the Human Rights Committee is not a binding interpreter, none of the cases are entirely unambiguous about the presence of a duty and in *Velasquez* the court did not offer injunctive relief to the plaintiffs demanding

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<sup>133</sup> M.C. Bassiouni & E.M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (The Hague: Martinus Nijhoff, 1995) p.45. They note, *ibid.*, that even the treaty duty under the Geneva Conventions remains effectively a dead letter.

<sup>134</sup> E.g. G. Gilbert, *Aspects of Extradition Law* (The Hague: Martinus Nijhoff, 1990), p.26; G. Gilbert, *Transnational Fugitive Offenders in International Law* (The Hague: Martinus Nijhoff, 1998) p.47; Stern, *supra* n.11, p.181; M.P. Scharf, “Swapping Amnesty for Peace, Was there a Duty to Prosecute International Crimes in Haiti?” (1996) 31 *Tex.I.L.J.* 1.

<sup>135</sup> 1966 International Covenant on Civil and Political Rights 999 UNTS 171, Article 6.

<sup>136</sup> On these, see D. Orientlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Former Regime” (1991) 100 *Yale L.J.* 2537, pp. 2568-2582.

<sup>137</sup> *Velasquez-Rodriguez v Honduras*, Inter-American Court of Human Rights, Judgment of July 29, 1988. (1989) 28 *I.L.M.* 29, paras. 166, 175-7. See Orientlicher, *ibid.* pp. 2576-2579; K. Ambos, “Impunity and International Criminal Law” (1997) 18 *H.R.L.J.* 1, pp.6-7. *Contra*, Scharf, *supra* n.134, pp.26-28.



prosecution as requested.<sup>138</sup> In response to his points, as he admits, many States often consider the HRC's jurisprudence as highly persuasive.<sup>139</sup> With respect to the cases he claims are ambiguous, at times he is perhaps reading in ambiguity where perhaps none exists. He is right about some of the cases, not others. *Muteba v Zaire*, for example, decided Zaire was "under a duty to... conduct an inquiry into the circumstances of [the victim's] torture, to punish those found guilty of torture...".<sup>140</sup> Scharf claims this meant "only that it had a duty to punish those found guilty by an enquiry," thus leaving the door open to measures such as dismissal from service, removal of pension etc.<sup>141</sup> Possibly, but the primary form of punishment remains sanctions imposed after criminal trial.<sup>142</sup> In relation to the *Velasquez* case, whilst the court did not offer an injunction to force the trial of the persons responsible, this does not alter what it said in the case about the obligations of the State party.

The body that has gone furthest towards recognising a duty to prosecute has been the Inter-American Commission on Human Rights, which declared Chile's amnesty to be incompatible with the Inter-American Convention on Human Rights, and that for compliance with the Convention to be achieved, perpetrators had to be punished.<sup>143</sup> Leaving aside the non-binding nature of the Commission's opinions, some other points may be made. The Chilean amnesty was imposed by the Pinochet regime itself, and

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<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.* On State response to state response to decisions of the HRC see D.J. Harris "The International Covenant on Civil and Political Rights and the United Kingdom: An Introduction" in D.J. Harris & S. Joseph (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: OUP, 1995) 1, pp.38-9.

<sup>140</sup> Comm. No 124/1982, 39 UNGAOR Supp. 40 Annex XIII, UN Doc. A/39/40. Annotation as in Scharf, *supra* n.134, p.27.

<sup>141</sup> Scharf, *ibid.* p.27.

<sup>142</sup> Joel Feinberg goes as far as to say the criminal sanction is effectively the only proper way to punish, other forms of action are punishment improperly so called. See J. Feinberg, *Doing and Deserving* (1970) 95-118 reprinted in A. Duff & D. Garland *A Reader on Punishment* (Oxford: OUP, 1994) 71, especially pp.80-83. When the HRC was using the phrase, however, it was probably not speaking of punishment in such a technical sense as Feinberg does.

<sup>143</sup> *Garay Hemosilla* et al, Case No. 10.843, 1996 Report of the Inter-American Commission on Human Rights, 156, pp.182-183, *Imma Reyes* et al, cases 11,228, *ibid.*, 196, pp.219-220. A detailed analysis of the Inter-American Organs' treatment of amnesties can be found in D. Cassel, "Lessons From the Americas: Guidelines for International Response to Amnesties for Atrocities" 1996) 59, *L. & Contemporary Problems* 197, see in particular pp.215-216. Also, see Generally, D. Shelton, *Remedies in International Human Rights Law* (Oxford: Clarendon, 1999), pp.322-327. In 1998 the Inter-American Commission repeated this position, and condemned the Chilean amnesty, 1998 Report of the Inter-American commission on Human Rights p.512, see Shelton, *ibid.* pp.326-327.



Chile's investigation commission was hobbled by its lack of power. The reaction of human rights bodies to more nuanced decisions not to prosecute, such as South Africa's, may not be the same.<sup>144</sup> The strongest argument against the use of these decisions to establish a duty to extradite or prosecute suspects is the continuing absence of State practice supporting a duty. Despite the persuasive authority of the human rights bodies' decisions, States have not denied that they have amnestied such offences, but have considered amnesties compatible with their international duties, a position that, in some instances appears to have been supported by the UN.<sup>145</sup> As Scharf puts it, "a 'rule' that is so divorced from the realities of State practice is unlikely to achieve substantial compliance in the real world, and, therefore, cannot be said to be a binding rule at all, but rather an aspiration".<sup>146</sup>

A further point that also must be made is that even if the duty was accepted, it would be applicable only to the State whose officials committed the offence. It would not be a universal duty to prosecute all offences. Any argument to the contrary would be subject to the same arguments identified in relation to *jus cogens* below.

A different way of establishing a duty to extradite or prosecute is suggested by Cherif Bassiouni. He suggests that international society has developed to the extent that there is a common interest in all international society in the repression of such offences, which, when combined with the right they all have to prosecute them, gives rise to a duty to either prosecute them or extradite them.<sup>147</sup> This is questionable: it implies a duty to extradite or prosecute from a permissive right to do so. More importantly, as Bassiouni recognises, it rests on the presumption of the international society being a *civitas maxima*,

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<sup>144</sup> See J. Dugard, *Dealing With the Crimes of a Past Regime: Is Amnesty Still an Option?* (1999) 12 *L.J.I.L.* 1001, p.1009-1010.

<sup>145</sup> See Dugard, *ibid.*, p.1003; M.P. Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes" (1996) 59 *L. & Contemporary Problems* 41, p.57-59. This was also the position of Lord Lloyd in the 1<sup>st</sup> *Pinochet* Appeal, *supra* n.22, p.929. On this, Lloyd is correct, unlike his dismissal of universal jurisdiction, this part of his decision correctly focuses on duties rather than rights.

<sup>146</sup> Scharf, *supra* n.134, p.41.

<sup>147</sup> Bassiouni & Wise, *supra* n.133, p.49-50. A similar argument, which is subject to the same criticisms is G.S. Gill, "Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute" in G.S. Goodwin-Gill & S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford: OUP, 1999) 199, pp.213-220.

which is hotly contested.<sup>148</sup> This thesis takes the view that we are not currently at the point where we can confidently derive normative conclusions from the move towards new values in the international community, so the approach taken by Bassiouni is not persuasive.<sup>149</sup>

Perhaps a more convincing argument for a duty would be from the nature of the crimes under consideration. The prohibitive norms they encapsulate are in many instances *jus cogens*.<sup>150</sup> From this Bassiouni implies that there is a duty to suppress such crimes and assist in bringing perpetrators to justice by extraditing or prosecuting them. The problem here is, does this duty follow from the fact that they are *jus cogens*? This cannot be guaranteed. It is true that the effects of *jus cogens* go beyond the invalidity of a treaty incompatible with such a norm, the essence of a *jus cogens* rule is such that it renders illegal any act conflicting with it.<sup>151</sup> The problem here is whether a State, by not prosecuting those suspects of international crimes whose activities are alleged to have violated *jus cogens* norms, is itself also violating the *jus cogens*. To imply a duty from this there are two levels of enquiry. First, does the content of the norm itself impose a duty to prosecute? Here Bassiouni's argument is left begging the question of whether there is such a duty. Secondly, and more importantly, to what extent does non-prosecution amount to an adoption of the acts? If the State has authored the action, then it may have the duty to prosecute the malefactors (as the action may be attributed to that State), but it has already shown itself willing to violate the obligation. In respect of other countries failing to prosecute the position is more difficult. An isolated instance of non prosecution is almost certainly not adoption of the acts, on the other hand, a systematic policy of refusal to extradite or prosecute perhaps could be. This may be supported by the *Restatement (Third) of Foreign Relations Law of the United States*, paragraph 702 where it states

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<sup>148</sup> *Ibid.* p. 26-37.

<sup>149</sup> This accords, for example with the view of Bassiouni's collaborator on his major work in the area, Edward Wise; see E.M. Wise, "*Aut Dedere Aut Judicare*: The Duty to Extradite or Prosecute" in M.C. Bassiouni (ed.), *supra* n.15, pp.27-28.

<sup>150</sup> M.C. Bassiouni, "International Crimes, *Jus Cogens* and *Obligatio Erga Omnes*" in Joyner (ed.) *supra* n.11, 133, p.133. See also L. Hannikainen *Peremptory Norms (Jus Cogens) in International Law* (Helsinki: Finnish Lawyers' Publishing Company, 1988), p.286.



that a State violates customary law if “as a matter of State policy, it... encourages or condones [various criminal acts]”.<sup>152</sup> If this is the case, then perhaps it could be considered that there is a duty on States to take actions to distance themselves from *jus cogens* violations, or at least not encourage or condone them. One way of doing this would be to prosecute at least some malefactors. Even so, this may be stretching the notion of complicity rather far.<sup>153</sup>

In sum there are various arguments used by some scholars by which they attempt to overcome the absence of a general duty to extradite or prosecute. On their own, they are incapable of overcoming the simple fact that States cannot be considered to have acted in a way that is indicative of sufficient practice or *opinio juris* necessary to establish a duty. There are possible movements in this direction, as there is increased prosecution of the core international crimes. However, to impose a positive duty on States to prosecute all core offences, would require much greater practice. The remaining arguments may show a way towards creating a paper based duty, but it is questionable if these, even were they to be accepted more widely in theory would easily transform themselves into State practice, given that until recently, there has been a widespread failure to respond even to clear treaty based duties such as those in the Geneva Conventions. This is a serious failing in the decentralised system of enforcement of international criminal law. It will be argued *infra*, pp.155-156, that the ICC is capable of making great progress in this area, by acting as an incentive for national prosecution.

The absence of a general duty to extradite or prosecute international crimes undermines their effective penal repression. In addition, the absence of a hierarchy of obligations where duties to extradite or prosecute exist can cause similar dilemmas to those involved in overlapping claims of jurisdiction, as the Lockerbie case has shown. In

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<sup>151</sup> Hannikainen, *ibid.* p.7.

<sup>152</sup> Third Restatement of US Foreign Relations Law. Vol 2 (1987) p165.

<sup>153</sup> Even those who argue in favour of complicity in State responsibility do so only for limited circumstances, where there is a more direct link than mere presence. See J. Quigley, “Complicity in International Law: A New Direction in the Law of State Responsibility” (1987) 58 *B.Y.B.I.L.* 77.



the field of these duties the various tribunals may represent a significant step forward. The founding documents of the ICTY, ICTR and the ICC do not explicitly enshrine the extradite or prosecute obligation, but may have formulated a functional equivalent.

For the UN Tribunals, the creation of a duty to take action is a result of Article 9 of the ICTY Statute (Article 8 of the ICTR Statute) which gives the tribunals the right to require the transferral of any person in any State's jurisdiction to it, for the purpose of prosecution. So where the UN Tribunal has jurisdiction, and has taken an interest in that individual, a duty is created for the custodial State. The duty is to transfer the suspect/indictée to the UN tribunal concerned, irrespective of its own preferred course of action. Therefore, not only is a duty similar to *aut dedere aut judicare* imposed, but it is clarified by the precedence given to surrender to the UN Tribunal concerned.

There is one caveat. In practice there is no duty on the Prosecutor to indict all persons against whom a *prima facie* case exists. The Statutes seem to impose that duty. Article 18(4) of the ICTY Statute (Article 17(4) ICTR Statute) states that "upon determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment".<sup>154</sup> However, this determination is left to the discretion of the Prosecutor who has not interpreted her duty to require indictment of all persons against whom such a case can be made, and who expressly follows a policy (which has never been protested) of primarily pursuing indictments against those in positions of command.<sup>155</sup> In *Ntuyuhaga*, the ICTR accepted the right of the Prosecutor not to proceed against a person indicted, and said matters of prosecution policy are for the Prosecutor alone.<sup>156</sup> Even after preparing an

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<sup>154</sup> Article 18(1) ICTY Statute (Article 17(1) ICTR Statute). A duty to investigate, itself an important point. For the procedure for the submission of indictments, see Rule of Procedure 47.

<sup>155</sup> R.J. Goldstone, "The International Tribunal for Former Yugoslavia: A Case Study in Security Council Action" (1995) 6 *Duke J.I. & C.L.* 5, p.7.

<sup>156</sup> *Supra* n.45. It must be accepted though, that once an indictment has been confirmed, it cannot be withdrawn without leave of the confirming judge, or once evidence has been presented, leave of the Trial Chamber, Rule of Procedure 51(A).

indictment, the Prosecutor can withdraw it at her discretion prior to confirmation by a judge, manifesting the absence of a duty.<sup>157</sup>

This is understandable, because of the limited resources of the Tribunals. It also does not detract from the obligation on the Prosecutor to investigate international crimes. Particularly as the ICTY and its Prosecutor exist to ensure the prosecution of such crimes, this limit is not too worrying. In any event, the powers and activities of the two UN tribunals have operated in a way which for many cases has led to a duty on States to take action (to transfer the suspect to the Tribunal for the purpose of trial) which is analogous to a duty to extradite or prosecute.<sup>158</sup>

For the Rome Statute, the situation is different, although the end result of ensuring a proper investigation of charges may also be achieved for States party to the Rome Statute or, when the Security Council passes a situation to the Prosecutor, all UN members. When information is passed to the Prosecutor, the Prosecutor has a duty to investigate the situation unless “he or she determines that there is no reasonable basis to proceed”.<sup>159</sup> It is worthwhile remembering that the Prosecutor is not limited to references from States or the Security Council, neither of which are duty bound to submit such references.<sup>160</sup> The Prosecutor is given the power, *ex proprio motu*, to initiate investigations “on the basis of information on crimes within the jurisdiction of the court”.<sup>161</sup> Subject to a Pre-Trial Chamber’s determination that there is “reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court”, the Prosecutor may

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<sup>157</sup> Rule of Procedure 51(A).

<sup>158</sup> For most of the treaty based duties to extradite or prosecute, in practice the duty only crystallises when another party to the treaty takes an interest in the particular case and expresses a desire to see the duty fulfilled one way or another.

<sup>159</sup> Article 53. The factors to be considered for this are if the information provided to him provides a reasonable basis to proceed, if the case would be admissible under Article 17, and if there are “nonetheless substantial reasons to believe that an investigation would not serve the interests of justice (Article 53(1)(a-c)), see M. Bergsmo & P. Kruger, “Article 53” in Triffterer (ed.), *supra* n.88, 701.



investigate the offences.<sup>162</sup> Unless the Security Council has passed the situation to the Prosecutor, she must inform all States party to the Statute and those “which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.”<sup>163</sup> Any one of these States, if they wish to prevent the Prosecutor acting, must investigate “its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in Article 5 and which relate to the information provided” by the Prosecutor, and notify her of this investigation within a month.<sup>164</sup> If this occurs, then the Prosecutor is entitled to require the State concerned to keep her informed about the investigation.<sup>165</sup> If the Prosecutor can persuade a Trial Chamber that the State is unwilling or unable to genuinely investigate the offences, then the Prosecutor may continue her investigations.<sup>166</sup>

The outcome of this rather tangled procedure is that should a State, the Security Council, or the Prosecutor become interested in a situation, then although they cannot directly impose a duty to extradite or prosecute on the relevant parties, steps can be taken to prompt them into taking action. This is because States, particularly in relation to offences by their nationals, are more likely to prefer to investigate at the national level, rather than have an investigation proceeded with in public by an independent international investigator. The powers of the Prosecutor to investigate offences and

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<sup>160</sup> Article 14, relating to State referrals is phrased in the permissive “may”. See A. Marchesio, “Article 14” in Triffterer (ed.), *supra* n.88 353. Unfortunately, if the practice of the various human rights bodies is used as a guide here, the probability of State referrals may not be high, see R. Cryer, “Commentary on the Rome Statute: A Cadenza for the Song of Those Who Died in Vain?” (1998) 3 *J.A.C.L.* 271, p.285. There was no suggestion in the Rome Conference that the Security Council would be under a duty to refer situations, and the basis for inclusion of such a power was that there was a permissive right of the Security Council to act. See generally L. Yee, “The International Criminal Court and the Security Council: Articles 13(b) and 16” in Lee (ed.), *supra* n.88, 143, pp.146-149.

<sup>161</sup> Article 15.

<sup>162</sup> That is, unless the Security Council has issued a deferral under Article 16 of the Statute. A serious possibility, and a large loophole deliberately inserted into the Statute. On Article 16 see Yee, *supra* n.160, pp.149-151; M. Bergsmo & J. Pejic, “Article 16” in Triffterer (ed.), *supra* n.88, 373.

<sup>163</sup> Article 18, see D.T. Ntanda Nsereko, “Article 18” in Triffterer (ed.), *supra* n.88, 395, Nsereko questions if this obligation applies if the States referred to are not parties to the Statute (p.399). It is likely that it does. His doubt is based on the requirement in Article 18(5) that States party requested to keep the prosecutor up to date on their efforts to investigate must respond. The fact that that duty is limited to States party is an application of the principle that treaties only put obligations on their parties.

<sup>164</sup> Article 18(2).

<sup>165</sup> Article 18(5).

<sup>166</sup> Article 18(2)(3). Either party can appeal a decision of the Trial Chamber on this (Article 18(4)). It may be noted that this also prioritises the obligation, the first obligation is on the State, to investigate, rather than



oversee national investigations could be used by a diligent Prosecutor to ensure offences are investigated in an impartial manner. If this was done, a duty to investigate offences could be seen to take shape. In addition to this, and unlike the duty to extradite or prosecute in many treaties, there is a supervisory organ, the Prosecutor's office, which has a mandate to ensure the operation of the Statute system. Of course, this all rests on how assiduous the Prosecutor is, and there is no guarantee that States will vote in a vigorous Prosecutor.

Although the Prosecutors for the ICTY/R have distinguished themselves by their independence and commitment to their task,<sup>167</sup> the alleged veto of Professor Bassiouni as Prosecutor due to the possibility that he would attend to his duties more vigorously than the creators of the ICTY wished<sup>168</sup> counsels some scepticism about State intentions. The situation for the ICC may not be the same. The ICTY was created even though several members of the Security Council were decidedly lukewarm about it.<sup>169</sup> The Rome Statute will come into force just after 60 States have ratified it.<sup>170</sup> The first 60 States to ratify the Statute are likely to be those most interested in setting up an effective court system, and it is those who will make up the Assembly of States Parties during the initial stages of the Court's existence. It is this Assembly which votes in the Prosecutor,<sup>171</sup> so it must be hoped that these States, being amongst the strongest supporters of the Court, will appoint a committed Prosecutor. If so, the Prosecutor could do a great deal to overcome the absence of a general duty to extradite or prosecute for States party to the Rome Statute.

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initially to send the accused to the Court. This secondary obligation only becomes relevant if the investigation is unsatisfactory.

<sup>167</sup> That is, all those who have actually taken up the position. The first appointed Prosecutor, Ramon Escobar-Salom, in the words of Geoffrey Robertson, "proved a disaster: he delayed taking up the job for five months, then decided to accept a better offer." G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Harmondsworth: Penguin, 1999) p.278.

<sup>168</sup> See M.C. Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for former Yugoslavia* (New York: Transnational, 1996) pp.270-271.

<sup>169</sup> See D. Forsythe, "Politics and the ICTY" in Clark & Sann, *supra* n.10, 185, pp.186-189.

<sup>170</sup> Rome Statute, Article 126.

<sup>171</sup> *Ibid.* Article 42(4).

The caveat that this is for States party alone is a large one. If the Security Council does not pass a matter to the Prosecutor (and there is no guarantee it will),<sup>172</sup> then the extent of the Prosecutor's bailiwick for this action is limited to States party, so unless the Statute reaches a near universal level of acceptance, this will remain a partial solution. Nonetheless, for States party to the Rome Statute, this is almost revolutionary.

## EXTRADITION

Closely tied with the issue of jurisdiction is that of extradition. Experience shows that those guilty of international crimes are liable to leave the *locus delicti* for a country unwilling to prosecute them. Thus, to obtain the presence of the accused, a country wishing to prosecute must seek the extradition of the accused. This can be a problem for two reasons, one relates to the conditions for extradition, the other with the institution itself.<sup>173</sup>

### CONDITIONS OF EXTRADITION

The duty to extradite in most of the bilateral extradition treaties is not absolute. One large problem is the refusal of many civil law countries to extradite their own nationals.<sup>174</sup> Another is the requirement that many common law countries have of the need to show a

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<sup>172</sup> Particularly with the hostility to the Court of at least one permanent member of the Council (the US and probably China), who can single-handedly prevent the Council acting to pass a matter to the Prosecutor.

<sup>173</sup> These problems also apply to Mutual Legal Assistance Treaties (MLA Treaties). Space constraints prevent lengthy discussion of them, but the problems noted in extradition frequently apply, *mutatis mutandis*, to MLA treaties. For example, many contain double criminality and political offence exceptions. See for example, A. Ellis & R.L. Pisani, "The United States Treaties on Mutual Assistance in Criminal Matters" in M.C. Bassiouni (ed.), *supra* n.10, 403, p.419 (noting the prevalence of political offence exceptions); D.D. Spinellis, "Securing Evidence Abroad: A European Perspective" in M.C. Bassiouni (ed.), *ibid.* 359, p.366, giving examples of the requirement of double criminality in some treaties. The problems relating to the bilateralist nature of extradition relations apply *a fortiori* to MLA treaties, as they are very much the exception rather than the rule, D.B. Heyman, "Two Models of National Models Towards International Cooperation in Law Enforcement" (1990) 31 *Harvard I.L.J.* 99, p.100.

<sup>174</sup> Gilbert, *supra* n.134, pp.95-99. As he notes, this refusal is being relaxed now.



*prima facie* case.<sup>175</sup> Both of these are self-explanatory. In addition, certain conditions must be fulfilled.<sup>176</sup> These include the rule of double criminality and speciality, which are that the crime for which extradition is sought must be a crime in both countries and if extradited for a particular crime, a person may only be tried for that crime.

The speciality rule is merely to ensure extradition requests are not used duplicitously, attempting to extradite for one type of crime, only to try the person for a crime which extradition would likely be refused.<sup>177</sup> With careful, good faith investigation, the speciality rule should not be a problem. The two rules of extradition that have caused particular problems are the double criminality requirement, and the “political offence exception”.<sup>178</sup>

The requirement of double criminality boils down to the necessity of the conduct for which extradition is sought being criminalised in both the requesting and requested State. The purpose of the double criminality rule is to prevent extraditions being made for aberrant crimes, which are the product of the idiosyncrasies of some legal systems.<sup>179</sup> This rationale should not apply to international crimes. The international crimes under discussion are the antithesis of aberrant, being accepted by the overwhelming majority (if not all) States as constituting crimes applicable to all. The crimes are overwhelmingly customary, and directly applicable to all persons. Therefore, there is no question of the person not being subject to the criminal prohibition, wherever it was committed. An absence of legislation implementing them nationally should not frustrate the transfer of suspects. This, though, has not been the case, as the *Pinochet* 3<sup>rd</sup> appeal showed. Only

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<sup>175</sup> Again, this requirement is showing some signs of being relaxed, for example it has no place in the European Convention on Extradition, E.T.S. No.24. See D. Poncet & P. Gully-Hart, “The European Approach” in M.C. Bassiouni (ed.), *supra* n.10, 277.

<sup>176</sup> See generally Gilbert (1990), *supra* n.134, Ch.3; Gilbert (1998), *supra* n.134, Ch. 6.

<sup>177</sup> For an instance of it’s application here, see *In re Issel* (1950) 18 *I.L.R.* 331 (Denmark).

<sup>178</sup> See *ibid.*, Ch.6; L.C. Green, “Political Offences, War Crimes and Extradition” (1962) 11 *I.C.L.Q.* 329; C. van den Wyngaert, “The Political Offence Exception to Extradition: How to Plug the ‘Terrorists’ loophole’ Without Departing from Fundamental Human Rights” (1990) 19 *Is.Y.B.H.R.* 297; J. Dugard & C. van den Wyngaert, “Reconciling Extradition with Human Rights” (1998) 92 *A.J.I.L.* 187.

<sup>179</sup> See Poncet & Gully-Hart, *supra* n.175, p.292 who phrase the rationale as lawfulness of deprivation of liberty, on the basis that it should be prosecutable in either State. The problem goes a little deeper than that in this author’s opinion, as their approach does not entirely explain why the offence must be prosecutable in both States when an international crime is in issue. They also refer (*ibid.*) to maintaining reciprocity in extradition. It is submitted that reciprocity also does not apply in relation to international crimes, as there is a community interest in repression of such crimes. If the reason it should be prosecutable in both States is an



Lord Millett was prepared to accept that extradition should proceed on the basis of customary international law, and then only on the basis that the UK is an incorporationist State as regards customary international law.<sup>180</sup> As incorporation of international crimes into domestic jurisdictions has not been especially impressive this could be a large problem, particularly as many States also incorporate a locational aspect to double criminality,<sup>181</sup> which requires that the requested State would also have to have extraterritorial jurisdiction over the offence.

The political offence exception rule is a mix of humanitarian concern for the defendant and unwillingness to enter into the internal affairs of other States. States worry that trials for political offences are politically motivated and unfair, and they do not wish to be seen to be taking sides.<sup>182</sup> To this end, most States exempt from extradition those offences which are of a political nature. This is uncontroversial for offences of a purely political nature, such as treason. Problems arise when the offence is of a mixed political and normal character, or a normal offence, carried out with a political motive.

In theory, this should not be a problem for international crimes. It is difficult to see how such crimes could be subsumed under the political offence exception, as Gilbert notes “that it [the exception] should be applied to war criminals may seem to be stretching the point to absurdity”.<sup>183</sup> In practice, the political offence has been used.

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aspect of a form of *nullum crimen sine lege* argument, it must also fall, the suspect is directly bound by international criminal law irrespective of the *lex locus delicti*.

<sup>180</sup> See Millett, *supra* n.36, p.912; for criticism of the *Pinochet* 3<sup>rd</sup> appeal on double criminality (on the basis of its reading of the temporal aspect of double criminality) see C. Warbrick, “Extradition Aspects of *Pinochet* 3” (1999) 48 *I.C.L.Q.* 958; M. Birnbaum, “Pinochet and Double Criminality” [2000] *Crim. L.R.* 127.

<sup>181</sup> Gilbert (1998), *supra* n.134, pp.112-113 criticises such uses of locational double criminality, on the ground that as long as the conduct is criminal in both States and the assertion of jurisdiction is accepted, no problems should arise. This is eminently sensible, particularly for international crimes. On the locational aspect of *Pinochet*, see Warbrick, *ibid.* p.959-960. This is the requirement that not only does the offence have to be criminal in the requested State, but also, if the requesting State is relying upon extraterritorial jurisdiction, that the requested State also has such extraterritorial jurisdiction over that offence. Again this requirement need not have to apply to international crimes, as all States have a right to prosecute such offences under universal jurisdiction. Their failure to do so should not stand in their way of co-operating with States that do. Universal jurisdiction is limited to a small number of accepted offences, and there is a community interest in their suppression, so it would not cause the problems, for example, that large extensions of passive personality jurisdiction do.

<sup>182</sup> Gilbert, *supra* n.134, p.113. Not least, many states require proportionality between the political aspect and the offence committed. This would be very difficult to show in most war crimes and effectively impossible for crimes against humanity, to even raise the question of if genocide could be proportional is ludicrous.

<sup>183</sup> *Ibid.*, p.135

Although Article VII of the Genocide Convention excludes the operation of the political offence exception to those accused of genocide, the Geneva Conventions Grave Breach provisions leave the question open. As a result of this, there have been some instances, particularly of Nazi war criminals, where extradition has been refused on this ground.<sup>184</sup> The most notorious instance of this was the refusal, by the US, to extradite Andrija Artukovic to Yugoslavia in 1956. The court in that case decided that crimes involving responsibility for 700,000 murders in Croatia were of a political character.<sup>185</sup> The 9<sup>th</sup> Circuit in that case said war crimes could be subject to the political offence exception, and all of the courts applied a test beyond any formulation of the political offence exception, accepting that crimes committed in obedience to governmental orders were political offences.<sup>186</sup> Fortunately, there is evidence of opposing practice, with many jurisdictions now accepting that such crimes cannot be political in this sense.<sup>187</sup> The US now accepts that the *Artukovic* decision was wrong, and they specifically rejected the application of the exception to Artukovic in 1986.<sup>188</sup> The increasing acceptance of this position, in tandem with the fact that very few war crimes and crimes against humanity could possibly meet the definitions of the political offence exception must bear out Green's conclusion that "the concept of political offences as it has developed in the practice of States and courts cannot be extended to protect a person accused of war

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<sup>184</sup> For example *in re Kahrs* (1948) 15 *I.L.R.* 972

<sup>185</sup> *Artukovic v Boyle* 140 Supp. 245 (S.D. California (1956); *Karadzole v Artukovic*, 247 F. 2d 198 (9<sup>th</sup> Circuit). (1957); 355 US 393 (1958); *ex rel Karadzole v Artukovic* 170 F. Supp. 383 (S.D. California) (1959).

<sup>186</sup> See Gilbert, *supra* n.134, p.214. The essence of the political offence exception is that the offence is against the state, not at the behest of the state. Green, *supra* n.178, p.330. *Re Castioni* [1891] 1 QB 149 at 159; *Re Giovanni Gatti* (1947), (1951) 15A.D. 145.

<sup>187</sup> For example, *State v Schulmann* (1966), (1970) 39 *I.L.R.* 433 (Ghana), *Kroeger v Prosecutor* (Switzerland) (1966), (1987) 72 *I.L.R.* 606; see Gilbert (1990), *supra* n.134, p.215; *Waegner Case* Tribunale Supremo Militare 12.3.1950. (Italy); *R v Wilson, ex p. Witness* (Australia), (1992) 88 *I.L.R.* 169 (Australia). In *Quinn v Robinson* 783 F.2d 776 (1986) p.779, the US 9<sup>th</sup> Circuit claimed that crimes against humanity were not susceptible to the political offence test. In *re Extradition of Atta Ahmad v Wigger* 426 F. Supp. 389 (1989) A US court said to prove the offence was political, the extraditee had to prove it did not violate the Geneva Conventions, Gilbert, *supra* n.134, p.249. The UK position may be inferred from *re Gross, ex p Treasury Solicitor* [1968] 3 All ER 804. Gilbert notes that the inference is that war crimes and crimes against humanity are not susceptible to the test. Gilbert (1998), *ibid.*, p.393.

<sup>188</sup> *Demjanjuk v Petrovsky* 776 F. 2d 571 (USCA 6<sup>th</sup> Cir. 1985); *cert. den.* 475 U.S. 1016 (1986), 628 F. Supp. 1370; 784 F. 2d 1254 (1986). See J. Moeller, "United States Treatment of Alleged Nazi War Criminals: International Law, Immigration law and the Need for International Co-operation" (1985) 25 *V.J.I.L.* 793, R.H. Reiss, "The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction and the Political Offense Doctrine" (1987) 20 *Cornell I.L.J.* 281.



crimes or crimes against humanity.”<sup>189</sup> At the least the exclusion of international criminals from the political offence exception is, as Gilbert claims, a developing rule of customary international law.<sup>190</sup> The fact that it has been used at all raises more questions of the wish of the executive to extradite the accused than the interpretation of the concept. As Gilbert points out: “the judges decisions... [on the exception]... often seem to owe more to foreign policy than to legal reasoning.”<sup>191</sup>

The UN Tribunals deal with the possibility of failure to extradite due to the conditions of extradition by a simple method: they simply declare the conditions to be inapplicable. The view was taken that extradition is a feature of the horizontal relationship between States. This differs from relations between States and the UN Tribunals, who are in a vertical, hierarchically superior position to States. Thus, joint rule of procedure 58 excludes the application of national law or treaty based bars to extradition or surrender.<sup>192</sup> This approach should avoid all the problems of the technical nature of extradition, but implementation of this provision has been uneven. Only 20 States have adopted legislation relating to obligations under the ICTY Statute,<sup>193</sup> and only four States have affirmed that they can perform all of their duties under international law without alteration of their existing laws. The situation in relation to the ICTR is worse, with only eleven States having co-operation legislation.<sup>194</sup> Even amongst those States having introduced implementing legislation, there are variations in the extent to which the provisions of that legislation conform to the obligations under the UN tribunal Statute and rules. Some, such as the UK, Spanish, and possibly the Croatian legislation do seem to confine any court based review to formal matters, such as that the person is not the

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<sup>189</sup> *Supra* n.178, p.354.

<sup>190</sup> Gilbert *supra* n.134, (1998), p395.

<sup>191</sup> *Supra* n.134 (1990), p.113. Carbonneau, in relation to the French decision not to extradite the terrorist Abu Daoud, states the court’s reasoning “strongly suggests that the court was searching for some sort of legal justification of a foregone political conclusion”. T Carbonneau “The Provisional Arrest and Subsequent Release of Abu Daoud by French Authorities” (1977) 17 *V.J.I.L.* 495, at p.510. Referring to the extradition of Abdullah Öcalan, Gilbert reaffirms “the process... has not dignified rendition within Europe and has highlighted how far *realpolitik* can interfere with the proper law of extradition”, G. Gilbert, “The Arrest of Abdullah Öcalan” (1999) 12 *L.J.I.L.* 565, p.573.

<sup>192</sup> ICTY *Rules of Procedure and Evidence* (IT/32/Rev17), Rule 58; ICTR *Rules of Procedure and Evidence*, Rule 58.

<sup>193</sup> Amnesty International, *Status of Signatures and Ratifications of the Statute of the International Criminal Court* (London: Amnesty International, 1999).



one named in the arrest warrant.<sup>195</sup> Others though, such as the Italian legislation are more problematic.<sup>196</sup>

With the exception of the Italian law, none of the implementing legislation refers to double criminality.<sup>197</sup> This exception aside, double criminality appears not to be relevant not only in the ideal scheme created by the ICTY Statute and Resolution 827, but also in practice. Some writers have been lukewarm about this abandonment.<sup>198</sup> It should be applauded, as discussed above, whatever merits the double criminality requirement has, its *raison d'être* do not apply to international crimes. Consonant with the current status of international law, none of the legislation contains an equivalent to the “political offence” exception, which can be considered otiose when the crime alleged is criminalised directly by international law.

Turning to other of the national limits to extradition, there have been problems with both the anomalies of the civil law system (the non extradition of nationals) and those of the common law countries (the requirement of demonstration of a *prima facie* case). Although the legislation of some civil law countries (such as Austria) expressly prevent the operation of their constitutional bars on extradition of nationals to surrender to the

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<sup>194</sup> *Ibid.*

<sup>195</sup> For the UK, see the United Nations, (International Tribunal)(Former Yugoslavia) Order 1996, Article 6(5), C. Warbrick “Co-operation with the International Criminal Tribunal for Yugoslavia” (1996) 45 *I.C.L.Q.* 947, p.951. There is one possible problem with the UK legislation, as it creates the possibility of non-surrender due to the operation of laws relating to past conviction. It is unlikely that this will cause problems in practice though. UK Order Article 6(d), Warbrick, *ibid.* p.951 For Spain, see Act 15/1994 on Cooperation With the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia, (2 June 1994), Article 4(3) In relation to Croatia, see Constitutional Act on the Co-operation with the International Criminal Tribunal, Narodna novine No.32/1996, Articles 13-24. See I. Josipovic, “Implementing Legislation for the Application of the Law on the International Criminal Tribunal for the Former Yugoslavia and Criteria for its Evaluation” (1998) 1 *Y.B.I.H.L.* 35, *passim*, especially, p.55 & 66. Josipovic claims the Croatian Act is fully in accordance with the obligations under the Statue. Croatia, however, for a long time attempted to hide from its obligations, pointing to its constitution’s prohibition of the surrender of nationals, a prohibition clearly trumped by Rule 58 and Article 29 of the ICTY Statute. For a rather self-serving rebuttal of the facts underlying the ICTY reports to the Security Council of non-compliance see Croatian Ministry of Justice, *White Paper on the Cooperation with the International Tribunal for the Prosecution of Persons Responsible for Serious violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991* (Zagreb: Ministry of Justice, 1999).

<sup>196</sup> Provisions on Cooperation With the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia, Decree law No 544 of 28 December 1993 & no 120 14 February 1994.

<sup>197</sup> See *Ibid.* Article 1(c-bis), Josipovic, *supra* n.195, p.66.

<sup>198</sup> Lady Fox, for example, criticises the UK government for providing for transfer in relation to crimes she claims are unknown to UK law. H. Fox, “The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal” (1997) 46 *I.C.L.Q.* 434, p.441-442.

UN tribunals,<sup>199</sup> this is not the case in all countries. The Croatian legislation, for example does not so provide,<sup>200</sup> and this provided the pretext for long periods of non compliance with surrender warrants. That Croatia persuaded ten suspects to “voluntarily surrender” themselves to the ICTY in 1997,<sup>201</sup> did not alter the fact that they were, at that time still using the excuse of their constitutional prohibition of the extradition of nationals to explain their non-compliance with transfer orders.<sup>202</sup> One of the primary reasons the FRY refuses to surrender its nationals to the ICTY is said to be based upon its constitutional prohibition of the extradition of its nationals.<sup>203</sup> The veracity of this argument has been rejected above, and its enunciation owes far more to politics than constitutional fidelity.

Even States ostensibly willing to assist the UN tribunals have run into problems. The primary example of this amongst common law States is the *Ntakirutimana* litigation in the US.<sup>204</sup> In this case a Texan court gave precedence to a controversial reading of US constitutional requirements to mandate itself to apply the *prima facie* requirement in US extradition law and to require there to be an extradition treaty in place for surrender to occur.<sup>205</sup> This situation, which highly embarrassed the US government, shows the

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<sup>199</sup> Austrian Federal Law on Cooperation With the International Tribunals, 1 June 1996, para 5, see Josipovic, *supra* n.195, p.62.

<sup>200</sup> See *supra* n.195.

<sup>201</sup> See D. Robinson, “Trials, Tribulations and Triumphs: Major Developments in 1997 at the International Criminal Tribunal for Yugoslavia” (1997) 35 *Canadian Y.B.I.L.* 179, p.181.

<sup>202</sup> Cooperation has improved, and this excuse is no longer used see T. Judah, “Croatia Reborn” 12 August 2000 *N.Y.R.* 20, p.23.

<sup>203</sup> G. Sluiter, “To Cooperate or not to Cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal” (1998) 11 *L.J.I.L.* 383, p.384.

<sup>204</sup> *In the Matter of the Surrender of Elizaphan Ntakirutimana* 1997 LEXIS 20714 (S.D. Tex., Laredo Div. Dec. 17 1997), See generally, Josipovic, *supra* n.195, pp.59-60; G. Sluiter, *ibid.*; J.J. Paust, “The Freeing of Ntakirutimana in the United States and ‘Extradition’ to the ICTR” (1998) 1 *Y.B.I.H.L.* 205. The surrender has now been approved at appellate level, (184 F.3d 419 US Court of Appeals, 5<sup>th</sup> Circuit), a further appeal to the Supreme Court was denied, see M.J. Coombes, “International Decisions: In re Surrender of Ntakirutimana” (2000) 94 *A.J.I.L.* 171. The US law is contained in Section 3181 of Title 18 USC. For attempts by US lawyers to justify the US governmental approach to implementing their obligations from the point of US constitutional law see K.J. Harris & R. Kushen, “Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the US constitution” (1996) 7 *Crim L.F.* 561; K.J. Harris & R. Kushen, “Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda” (1996) 90 *A.J.I.L.* 510. These of course are of more interest to US constitutional lawyers than international lawyers.

<sup>205</sup> Harris & Kushen, *ibid.* pp.599-600 attempt to prove that a warrant from one of the UN Tribunals would cover this requirement. This slightly misses the point, under the Statute, it is not that the ICTY has to fulfil these requirements, but that they are irrelevant. On the other hand, the ICTY has entered into agreements with the US which oblige it to supply such information. The legal basis for the ICTY entering into these agreements is uncertain.



difficulty of overcoming entrenched laws on extradition, which are applied by the US to surrender to the UN tribunals.<sup>206</sup>

In conclusion, for the conditions of extradition, the UN tribunal's statutes take a bold approach, which has led to a significant reduction in the problems which have plagued extradition in practice. In relation to the conditions of extradition, there has been a fair degree of success in removing the general conditions, such as double criminality, and the political offence exception. Unfortunately, in practice the legislative enactments that there are<sup>207</sup> have not all lived up to the promise of the theoretical regime, and ironically, it has been the conditions peculiar to the common and civil law systems that have proven most problematic here. To the extent to which conditions of extradition operate to protect human rights,<sup>208</sup> their removal may be of concern. It can only be hoped that the protections for human rights contained in the Statutes of the UN tribunals will suffice to ease concern.<sup>209</sup> It is almost certain that the level of human rights protection is at least as high as in many States which enjoy extradition relations with countries committed to human rights.<sup>210</sup>

The Rome Statute's provisions on the conditions of extradition are a little less absolute than the corresponding articles in the UN Tribunals' Statutes. Article 89 of the Rome Statute sets out the obligations of the parties on surrender, subject to the

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<sup>206</sup> To the extent to which the US cannot surrender the accused to the UN tribunals, they violate the Statutes and resolutions setting up those tribunals.

<sup>207</sup> The low number of which is itself a problem.

<sup>208</sup> For debate on this issue, see Dugard & van Den Wyngaert, *supra* n.175.

<sup>209</sup> This has not been enough for some, see Fox, *supra* n.198, pp.437-438.

<sup>210</sup> The level of protection of human rights in the Tribunals has been the subject of much debate, especially surrounding the use of an anonymous witness in the *Tadic* trial. See, Y.M.O Featherstone, "The International Criminal Tribunal for Former Yugoslavia: Recent Developments in Witness Protection" (1997) 10 *L.J.I.L.* 179; A-M La Rosa, "A Tremendous Challenge for the International Criminal Tribunals: Reconciling the Requirements of International Humanitarian Law with Those of Fair Trial" (1997) 312 *I.R.R.C.* 635; A. Sherman, "Sympathy for the Devil: Examining the Defendant's Right to Confront Before the International War Crimes Tribunal" (1996) 10 *Emory I.L.R.* 833; J. Sloan, "The International Criminal Tribunal for Former Yugoslavia and Human Rights: A Closer Look" (1996) 9 *L.J.I.L.* 479; N.A. Affolder, "*Tadic*, the Anonymous Witness and the Sources of International Procedural Law" (1998) 19 *Michigan J.I.L.* 445; C. Chinkin, "Due Process and Witness Anonymity" (1997) 91 *A.J.I.L.* 75; M Leigh, "Witness Anonymity is Inconsistent with Due Process" (1997) 91 *A.J.I.L.* 80; A. Cassese, "The International Criminal Tribunal for Former Yugoslavia and Human Rights" (1997) 1 *European H.R.L.R.* 329; V.M. Creta, "The Search for Justice in Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia" (1998) 20 *Houston J.I.L.* 381; C. Warbrick, "International Criminal Courts and Fair Trial" (1998) 3 *J.A.C.L.* 45.



requirements set out in Article 91. Article 91 does not mention any limits such as the political offence limitation, or dual criminality, or nationality. It must be considered therefore, that these limits are inapplicable in relation to the surrender process.<sup>211</sup> This cannot but be welcomed.

There does, though, appear to be one limit left. This is probably due to the problems associated with the *Ntakirutimana* litigation in the US and is contained in Article 91(2)(c). Article 91(2)(c) requires the court to accompany the request with “such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the court”. As a result, some common law States’ requirement of the showing of a *prima facie* case has been retained, albeit in attenuated form. Although the requirement may not, in theory, be too burdensome, the *Ntakirutimana* litigation shows this need not necessarily be the case.<sup>212</sup> Civil law States may also feel aggrieved that they have given up their system-specific prohibition on the surrender of nationals, while common law States have managed to

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<sup>211</sup> This can be supported by the conspicuous absence of the term “extradition” in this part of the Statute. Its use was specifically avoided, as it was wished to create a separate regime to extradition for surrender to the court. Article 91(1)(c) which deals with surrender also draws attention to the “distinct nature of the court”. As Strijards notes, G. Strijards, “The Institution of the International Criminal Court” (1999) 12 *L.J.I.L.* 671, p.675 the ILC, when introducing the concept into the Draft Statute saw it as a form of informal transfer, specifically put in to avoid national law limitations. He is concerned that the reference to “procedures under their national law” in Article 89 may bring it back in. This appears to overlook the obligation in Article 88 to have national legislation that allows full co-operation with the Court in accordance with the Statute; the wording served to emphasise “procedures are to be used to meet, not to defeat the obligation to comply with requests”, K Prost, “Article 88” in Triffterer, *supra* n.88, 1069, p.170. In the Canadian draft “Act Respecting Genocide, Crimes Against Humanity and War Crimes and to Implement the Rome Statute of the International Criminal Court, and to Make Consequential Amendments to Other Acts” Bill No. C-19 s.52 expressly disapply grounds for refusal (of extradition) under Canadian law when the requesting body is the ICC. This is in accordance with Article 102, which specifically differentiates “surrender” to the ICC, and “extradition” which is delivery of a suspect between States. See C. Kress, “Article 102” in Triffterer (ed.), *ibid.*, 1157, p.1157 who notes it was specifically introduced to deal with the problem of surrender of nationals.

<sup>212</sup> It is true, of course that the refusal, at first instance, was overturned on appeal. The fact that the first instance decision necessitated this shows the possible problems involved in using the exception, which could be interpreted *mala fides* by States in an attempt to evade their obligations under the Statute.

retain their requirement of showing a *prima facie* case.<sup>213</sup> In all though, the regime set up by the Rome Statute overcomes a large number of problems related to the conditions of extradition, an advance which could have significant implications for the surrender of persons for trial accused of international crimes.<sup>214</sup>

## THE BILATERAL NATURE OF THE EXTRADITION SYSTEM

Many of the problems related to national use of extradition are aspects of a more general problem with extradition; it “is often tied to a political axis. Absent treaty or convention, extradition practice depends on comity and reciprocity”.<sup>215</sup> As discussed above, it may be possible to contend that there is a duty to extradite or prosecute, however, in practice States have refused to accept such a duty. Some States are prepared to extradite on the basis of international comity, whilst others, such as the US and Canada refuse to extradite to countries with which they do not have an extradition treaty.<sup>216</sup> The treaty regimes entered into by States are primarily done so on a bilateral basis, and only

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<sup>213</sup> Gilbert, for example suggests that in extradition, both should be abolished (see *supra* n.134 (1998), pp.178-179). This would be a way forward, but abolishing one alone creates an imbalance. In addition, the trend even in common law States is towards a reduction in the use of the *prima facie* requirement, which is inapplicable to extraditions under the removed in the European Convention on Extradition, E.T.S. No.24. An oddity created by the Rome Statute is that if the UK was requested to extradite a suspect for an ordinary crime to the Netherlands, as both are parties to the European Convention, the Netherlands would not have to show a *prima facie* case. If however, the ICC, situated in the Netherlands, wished to obtain the surrender of an accused person, for an international crime, the UK could presumably rely on its normal requirement of the demonstration of a *prima facie* case in its extradition treaties, to require such proof (an unwarranted assumption of Article 91(1)(c) is that a State's conditions of extradition are uniform ). The regime thus created for the ICC may well, therefore, run directly against the trend of making the extradition or surrender of suspected international criminals simpler.

<sup>214</sup> The same concerns, and considerations in rebuttal, on human rights as have been raised about the UN Tribunals may also apply here.

<sup>215</sup> R. Friedlander, “Problems of Enforcing International Criminal Law” in M.C. Bassiouni (ed.), *International Criminal Law Vol. III: Enforcement*, (Dobbs Ferry, New York: Transnational, 1987) 13, p.17.

<sup>216</sup> For the US see *Factor v Laubenheimer* 290 US 276, 287 (1933); See generally, J. Wagner, “US Prosecution of Past and Future War Criminals and Criminals Against Humanity: Proposals for Reform Based on the Canadian and Australian Experiences” (1989) 29 *V.J.I.L.* 887, p.892; S. Williams “Laudable Principles Lacking Implementation: The Prosecution of War Criminals in Canada” in McCormack & Simpson (eds.) *supra* n.26, 151, p.155.



with friendly States.<sup>217</sup> This comes from the very traditional, bilateral view of the self-interest of States which is in some ways at odds with the ideas of universal crimes.

Even when there is a treaty basis for extradition, many countries treat the obligation as merely giving rise to an executive discretion, the executive retaining the final decision on the extradition.<sup>218</sup> Courts in these countries merely determine if legal grounds permitting extradition exist, not if extradition should occur. This has led to decisions based on criteria far removed from legal obligations.<sup>219</sup> Regimes are not above supporting those who have helped them internally, for example Klaus Barbie was shielded by the Bolivian authorities until a government hostile to the one he assisted gained power. In that instance the offer of an aid package by the French government was also not irrelevant.<sup>220</sup> Until very recently, Western States have been particularly reluctant to extradite to the (former) Eastern bloc countries. Countries such as the UK and Australia were explicit about this,<sup>221</sup> other countries just did not enter into extradition treaties with them.<sup>222</sup> This reluctance to extradite to unfriendly regimes is not limited to the Eastern bloc, the entire Lockerbie situation has arisen due to Libya being unwilling to extradite to an unfriendly country, with the US and UK not wishing Libya to prosecute the accused bombers itself.<sup>223</sup>

In relation to overcoming the essentially bilateral form of extradition relations, the (near) universal secondary jurisdiction of the UN tribunals (i.e. their power to address

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<sup>217</sup> There are some multilateral approaches, such as the European Convention on Extradition and the Commonwealth rendition scheme of mutual legislation, but these are the exception, rather than the rule.

<sup>218</sup> Gilbert, *supra* n.134 (1990), p.162. These countries include the US (M.C. Bassiouni, "Law and Practice of the United States" in Bassiouni (ed.), *supra* n.10, 191; Moeller *supra* n.188, p.804, this position has not been altered by *Lo Bue v Christopher* 893 F. Supp. (65 D.D.C. 1995) 82 F.3d 1081 (D.C.Cir. 1996) as its finding of unconstitutionality related only to a review of the court's legal findings, not the right to decide on extradition., on this, Gilbert suggests that it is "aberrant" and should be ignored (*supra* n.134 (1998), p. 83)), Canada (Canadian Extradition Act RSC 1985 c.E-23 SC 1992 c.13, s.25) the UK, Extradition Act 1989 s12.

<sup>219</sup> Gilbert, *ibid.*, p.114. Or indeed, as the experience of Columbia and the "extraditables" in the 1980s shows, those capable of wielding power in that country. For an account of their actions and their influence on the political nature of the refusal of their extradition see G.G. Marquez, *News of a Kidnapping* (London: Jonathan Cape, 1997).

<sup>220</sup> G. Binder, "Representing Nazism: Advocacy and Identity in the Trial of Klaus Barbie" (1989) *Yale L.J.* 1321, p.1327.

<sup>221</sup> See Green, *supra* n.178, pp. 346, 352.

<sup>222</sup> See e.g. Williams *supra* n.216.

<sup>223</sup> This is an oft-overlooked aspect of the dispute. See C.C. Joyner & W.P. Rothbaum, "Libya, the Aerial Incident at Lockerbie: What Lessons for International Extradition Law" (1993) 14 *Mich.J.I.L.* 222.

binding surrender orders to States) obviates the problem. The UN tribunals entirely alter the system of transfer of persons for those under their jurisdiction. Irrespective of the existence of a traditional extradition treaty, they are entitled to demand the surrender of the people concerned, wherever they are found. This represents a complete break with the normal, bilateral system, which relies on the happenstance of suspects being found in a country enjoying extradition relations with the country wishing to try them or is prepared to extradite on grounds of international comity.

Turning to the Rome Statute, as a treaty, its obligations will only apply between the parties, unless the Security Council has referred the matter to the Court (in which case it would appear that there could be an obligation on all States to obey the Court's orders).<sup>224</sup> The ICC's power to address, *ex proprio motu*, binding surrender orders to States, though, is limited to States party. In this, it differs from the UN tribunals, who have the power to address surrender orders to practically all States. Although this means the answer the Rome Statute offers to the problem of the bilateral nature of extradition is not total, as is the approach taken for the UN tribunals, this should not blind us to the major advance made by the ICC's structure. After all, even within its limits, it amounts to a central institution, which may address orders to all the States party, who will be at least 60 States. For the parties, at least, it is an important addition to their extradition/surrender regimes. For the ICC, it is analogous to having extradition/surrender treaties with at least 60 States, when many States party will not have extradition relations *inter se*, be it because of

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<sup>224</sup> That appears to be the implication of Articles 86, and 87(1)(5)(7). Article 86 Gives the general obligation to co-operate, for States party. Article 87(1) gives the court the power to address orders to States party. There is no express mention of non parties in this part, but Article 87(5) may well provide the answer. That Article provides that "The Court may invite any State not party to this Statute to provide assistance under this part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis". "Any other appropriate basis" will almost definitely include a Security Council Resolution, since that was the method used in the ICTY & ICTR to impose a duty to co-operate, and such an obligation is likely to be appended to any resolution sending a situation to the prosecutor. This interpretation is strengthened when the provisions of the second sentence of 87(5) is examined. This reads "[w]here a State not party to this Statute fails to co-operate with requests pursuant to any such arrangement or agreement the Court may inform ...[where the Security Council referred the matter to the Court]... the Security Council". The reporting of non compliance to the Security Council is highly analogous to the procedure outlined for the ICTY in the *Blaskic* case ((discussed above). The *Blaskic* case was almost certainly on the minds of the drafters, and Article 87 seems to reflect the underlying understanding that when the Security Council sends a situation to the prosecutor, it will include an obligation. The drafters though were quite careful to avoid the implication that any obligation on non parties could be imposed by the treaty without their consent. The



the necessity not having arisen, or the States not being particularly friendly. This puts the Court in a strong position, but also may bring benefits to its parties. If they receive a request for extradition for a person subject to the jurisdiction of the ICC, which they are unable or unwilling to fulfil (for example, as they have no extradition treaty, or there is a serious question of the ability or willingness of the requesting State to grant the accused a fair trial), they would not be left with the options of prosecuting the person themselves, with the logistical and political difficulties this possibly entails, or allowing someone to escape trial for very serious acts. In this instance, they would be able to waive their complementarity rights under the Statute, and send that person to the ICC, with whom it has surrender relations, and where human rights are fairly well protected.<sup>225</sup> The ICC therefore represents a substantial improvement over the traditional system, and manifests an acceptance of the new values in international law, overcoming at a minimum, some of the problems associated with the bilateral nature of extradition.

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### IRREGULAR RENDITION

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Due to the failings in the practice of international extradition, certain other methods have been used to obtain custody over defendants. Even where extradition would be possible, it has been perceived as too slow or uncertain by some States who are interested in obtaining a particular defendant.<sup>226</sup> As a result, some countries have taken advantage of their courts' acceptance of jurisdiction irrespective of the methods by which the person was brought before them.<sup>227</sup>

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Security Council's power to do so, is a matter extraneous to the Rome Statute. On the last point, see C. Kress & K. Schlunck, "Article 87" in Triffterer (ed.), *supra* n.88, 1055, p.1061.

<sup>225</sup> For a discussion of the approach that the ICC should take towards human rights protection, see S. Stapleton, "Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation" (1999) 31 *N.Y.U.J.I.L. & Politics* 535.

<sup>226</sup> Gilbert, *supra* n.134, p.184; Lagodny, *supra* n.17, p.9.

<sup>227</sup> For example, see Eichmann, *supra* n.17, p.59 (Trial level). The same refusal to concern themselves with

## DENATURALISATION AND DEPORTATION

The less serious form of irregular rendition occurs by denaturalisation and deportation. Transfer by this method involves the revocation of an obtained citizenship, then deportation. It usually occurs when someone is discovered who is likely to have committed an international crime prior to coming to a country, and concealed the commission of the offence to gain citizenship. In the nature of deportation inheres one of the major drawbacks, it may only be done for those who have obtained citizenship, it cannot be done for nationals.<sup>228</sup> Another problem is that whilst, in distinction to extradition, it may be done unilaterally, not requiring another State to request such action it does require a country to be willing to accept the person. This may not be a problem where a country wishes to try the accused, but this may not always be the case. Even where a country has indicated willingness to try the deportee, it is often the case that he is given the option of choosing where to go, though this is usually limited to one choice.<sup>229</sup> If there is one country offering a safe haven, then he is likely to choose that, thus frustrating attempts to bring that person to justice. On the other hand, it is also used hypocritically by States, as it does not require extradition relations between the deporting and receiving States. It has been used to circumvent the safeguards contained in extradition law, and to collusively send accused persons to countries to which extradition has been refused. Denaturalisation in the end fails to solve the problem, it either allows

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the manner in which custody was effected is present in the US under the *Ker-Frisbie* doctrine (*Ker v Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed 421 (1886), *Frisbie v Collins*, 342 US 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952)). Other countries courts have given themselves a limited discretion to review the manner of the person's attendance, the UK is one of these (*R v Horseferry Road Magistrates, ex. p. Bennett* [1993] 2 All E.R. 318). Other countries following this route include New Zealand (*R v Hartley* [1978] 2 NZLR 199), South Africa, *State v Ebrahim* (1 S.Af.Crim.L.R. 307) Zimbabwe, (*State v Beahan* 1992, 103 I.L.R. 203) and Switzerland (Decision of Swiss Federal Supreme Court 25.7.82, Eur. Grund. Zeitschrift (1983). See generally, Gilbert (1998), *supra* n.134, pp.185-193. As a result, Mann's comment (F. Mann, *Further Studies in International Law* (Oxford: OUP, 1990) p.346); having canvassed Israeli, US, UK, French and German authority, that "with rare unanimity and undeniable justification the courts of the world have held that the manner in which an accused has been brought before the court does not, and, indeed cannot, deprive it of jurisdiction" must, whilst accepted as generally acceptable, (in law if not morality), be qualified inasmuch as some courts retain a discretion to refuse to hear a case.

<sup>228</sup> See Moeller *supra*, n.188, pp.813-4.

<sup>229</sup> If the country of choice refuses to accept him, then the deporting country finds one itself. See Ratner & Abrams, *supra* n.16, p.213.



the accused to escape any adjudication of his crimes, or allows a country to send that person to a country they are not prepared to formally extradite to, by a procedure that does not fully respect the rights of the accused.<sup>230</sup>

## ABDUCTION AND LURING

The wrongs involved in denaturalisation pale into insignificance when compared to those involved in another form of irregular rendition, abduction. Unlike the (generally) collusive process of deportation, abduction involves the non-consensual entry of State agents onto another's territory to forcibly remove an alleged international criminal to a jurisdiction willing to try him. The most famous abduction is that of Adolf Eichmann from Argentina by Israel.<sup>231</sup> It is clear from the Security Council debates and the Resolution which it issued (Resolution 138<sup>232</sup>) that such action is a violation of the sovereignty of the State from which the accused is abducted. It is also a flagrant violation of the human rights of the accused, who has the right, if he is to be extradited, to at least present arguments against the extradition, and to not be subject to arbitrary arrest and imprisonment or to deprived of liberty "except on such grounds and in accordance with such procedures as are established by law".<sup>233</sup>

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<sup>230</sup> For a discussion of examples of collusive deportation and how the US procedures fail to respect defendant's rights see G. Getschman, "The Uncertain Role of Innocence in United States Efforts to Deport Nazi War Criminals" (1988) 21 *Cornell I.L.J.* 287.

<sup>231</sup> Israel, rather unconvincingly, claimed that the actions were of private citizens, not its agents. Recently, one of Eichmann's abductors wrote a book explaining his role, as a Mossad agent, in the events, see Z. Aharoni, *Operation Eichmann* (London: Cassell, 1996). Even if Israel's assertion was correct, it is clear that Israel adopted their acts by retaining custody of, and trying Eichmann. See Mann, *supra* n.227, p.339-40. See generally J.E.S. Fawcett, "The *Eichmann* Case" (1962) 39 *B.Y.B.I.L.* 181, especially pp.197-201; D. Lasok, "The Eichmann Trial" (1962) 11 *I.C.L.Q.* 355; P. Papadatos, *The Eichmann Trial* (London: Stevens, 1961); H. Silving, "In re Eichmann: A Dilemma of Law and Morality" (1961) 55 *A.J.I.L.* 307, especially p312-318; J. Weinig, "Enforcing the Lessons of History: Israel Judges the Holocaust" in McCormack & Simpson, *supra* n.26, 103, pp.112-3.

<sup>232</sup> UN Doc. S/RES/138. It is true, as Henkin notes that "the debates revealed some understanding, if not sympathy, for Israel's position" L. Henkin, *How Nations Behave* (New York: Columbia U.P., 2<sup>nd</sup> ed., 1979) pp.275-276, but that cannot take all the sting from the resolution.

<sup>233</sup> ICCPR Art 9(1). On this see M. Nowak, *ICCPR Commentary* (Kehl am Rhein: Engel, 1993) pp.168-172. The UN Human Rights Committee has decided, under Optional Protocol I, that a US abduction of A Colombian in Ecuador, and his removal to the US for trial, amounted to a violation of Article 9. *Canon Garcia v Ecuador* (5.11.91, UN Doc CCPR/C/43/D/319/1988).

Abduction is also highly detrimental to relations between States. In the *Eichmann* case, Argentina was satisfied with an apology alone, and effectively waived any further claim, including that for the return of Eichmann.<sup>234</sup> This was a highly unusual case, perhaps due to the gravity of his crime, (a factor which may apply to all “core” crimes, although an increase in abductions is unlikely to be welcome). More recently, international abduction has caused serious tensions in relations between States. The most famous of these is the *Alvarez-Machain* case. Here US agents abducted a Mexican and spirited him away to the US for trial for the alleged murder of a US DEA official. Despite the fact that there was an extradition treaty in force between the two countries and Mexico had not in the past been capricious in refusal of extradition, the US Supreme Court upheld the right of US courts to hear the case.<sup>235</sup> The US failure to even request extradition, then its abduction and removal of a Mexican citizen to the US prompted a protest from Mexico, and other States repeated Mexico’s claim that the actions of the US were a violation of international law.<sup>236</sup> A Kreczko (US Dept. of State deputy legal advisor) reported to a House of Representatives sub-committee that “many governments expressed outrage that the United States believes it has the right to decide unilaterally to enter their territory and abduct one of their nationals. Governments have informed us that they would regard such action as a breach of international law [and would seek prosecution of the agents concerned and review their extradition treaties with the US]”.<sup>237</sup>

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<sup>234</sup> See Fawcett *supra* n.231, p.193-4; Silving, *supra* n.231.

<sup>235</sup> 60 U.S.L.W. 4523 (June 15<sup>th</sup> 1992). The case effectively admitted that the abduction was a violation of international law, *ibid.* p.4527. The case turned on whether the abduction was a violation of the extradition treaty, on the grounds that abduction was not specifically prohibited by the treaty, the court, highly controversially, decided it did not. See R. Rafuse “International Abduction and the US Supreme Court: The Law of the Jungle Reigns” (1993) 42 *I.C.L.Q.* 882; M. Glennon “State-Sponsored Abduction: A Comment on *United States v Alvarez-Machain*” (1992) 86 *A.J.I.L.* 746; *contra*, M. Halberstam “In Defence of the Supreme Court Decision in *Alvarez-Machain*” (1992) 86 *A.J.I.L.* 736. The *Alvarez* case was followed in *US v Noriega* 117 F.3d 1206 at 1212-3. This when the method of abduction was a full scale invasion, and harassment of a diplomatic mission.

<sup>236</sup> Canada gave an *amicus curiae* brief for Alvarez-Machain stating that the US had violated international law and if it had involved a Canadian citizen they would have considered it a violation of the extradition treaty (as an extradition treaty is the exclusive method of obtaining defendants from that country). Canada also said it would have protested, demanded extradition or prosecution of the agents involved and commented that the whole situation gave cause for concern over the application of US treaties. (1991) 31 *I.L.M.* 919.

<sup>237</sup> Reprinted in J. Paust, M.C. Bassiouni, S. Williams, M.P. Scharf, J. Gurulé & B. Zagaris, *International Criminal Law: Cases and Materials* (Durham, N.C.: Carolina A.P., 1996) pp.480-81.



As the above shows, abduction is simply unacceptable as a means of obtaining custody over those accused of even serious crimes. It violates international law on a number of counts, and is seriously detrimental to inter-State relations. Shearer, writing in 1971 summed up the position admirably: “[a]bduction is such a manifestly extra-legal act, and in practice so hazardous and uncertain, that it is unworthy of consideration as an alternative method to extradition”.<sup>238</sup> Whilst criticism becomes more muted when offences of the gravity of Eichmann’s are involved,<sup>239</sup> this does not alter the fundamental illegality of abduction.

Luring is a slightly different process. In luring, the person is persuaded to leave the jurisdiction of the State where they are staying, under false pretences, and when they are outside the jurisdiction of that State they are arrested. It does not represent such a huge invasion of sovereignty as abduction, but as it still requires some unconsented to official law enforcement activities in a foreign State, it represents a violation of international law.

The UN Tribunals have had cause to consider irregular rendition, not because of any absence of duty on States (and non State entities) to fulfil requests for surrender, but because of the reluctance of certain States to actually do so. As with extradition, where it fails, other methods have sprung up. Instances of irregular rendition centre mostly on the ICTY suspects, particularly those in *Republika Srpska* and the FRY, who have been the least co-operative with the ICTY’s surrender orders. It is clear that when NATO forces arrest persons on Bosnian territory, they are acting there with a Chapter VII mandate, and with the consent of the Bosnian government.<sup>240</sup> As a result, such arrests, occurring as a consented to exercise of police authority, do not amount to kidnapping. For Eastern Slavonia, similar conditions applied, as Security Council 1037 gave UNTAES (the United Nations Transitional Authority in Eastern Slavonia) complete authority (which was

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<sup>238</sup> I.A. Shearer, *Extradition in International Law* (Manchester: MUP, 1971) p.75.

<sup>239</sup> *Supra* n.232.

consented to by Croatia, the territorial sovereign).<sup>241</sup> Currently, there have been no substantiated cases where an accused has been arrested outside these areas by bodies other than the regular police authorities of that State. Luring of suspects into capture has been an active issue. This was raised by Slavko Dokmanovic, who claimed he was lured from the FRY (who had not been requested to surrender him) to Eastern Slavonia, allegedly to discuss compensation for lost property. Upon arrival in Eastern Slavonia, he was arrested, and transferred to the ICTY. The Trial Chamber dealing with his application claimed (controversially) that luring was not contrary to international law.<sup>242</sup> As discussed above this is, to say the least, questionable.<sup>243</sup> The Chamber's general approach seemed more firmly grounded in existing law. The Trial Chamber claimed that if any of the accused's human rights had been violated, they could refuse to try the accused.<sup>244</sup> Therefore the ICTY has rejected the *mala captus bene detentus* doctrine. The joint Appeals Chamber in *Prosecutor v Barayagwiza*<sup>245</sup> has confirmed this approach (in a different situation). The Chamber examined cases such as *Bennett*,<sup>246</sup> and determined that they had a residual power to refuse to hear a case where there had been serious violations of human rights prior to trial.<sup>247</sup> This, as in national jurisdictions, is probably as far as courts can be expected to go, enabling themselves to refuse to adopt such actions by trial on a case by case basis. It may be hoped that, when kidnapping occurs, the ICTY will be unlikely to accept the suspect for trial.<sup>248</sup>

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<sup>240</sup> Pursuant to Security Council Resolution 1031 and Article 9 General Framework Agreement, Article IV(4) Annex 4, & Article 10, Annex 1-A of the Dayton Peace Agreement. See N Figa-Talamanca, "The Role of NATO in the Peace Agreement for Bosnia and Herzegovina" (1997) 7 *E.J.I.L.* 164, pp.171-172; P. Gaeta, "Is NATO Authorised or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?" (1998) 8 *E.J.I.L.* 174, pp.175-178.

<sup>241</sup> See *Prosecutor v Mrksic, Radic, Sljivancanin & Dokmanovic*, Decision on the Motion for Release by the Accused Slavko Dokmanovic, IT-95-13a-PT, 22 October 1997, paras 44-46.

<sup>242</sup> *Ibid.* para 57.

<sup>243</sup> *Supra* p.144; See also M.P. Scharf, "The Prosecutor v Slavko Dokmanovic: Irregular Rendition and the ICTY" (1998) 11 *L.J.I.L.* 369, pp.373-376.

<sup>244</sup> *Dokmanovic*, *supra* n.241, para 60.

<sup>245</sup> *Prosecutor v Barayagwiza*, Decision, 19 November 1999, ICTR-97-19-A.

<sup>246</sup> *R v Horseferry Road Magistrates, ex. p. Bennett* [1993] 2 All E.R. 318.

<sup>247</sup> *Barayagwiza*, *supra* n.245, paras 70-77.

<sup>248</sup> It must be said though, that so far, the ICTY has been uncomfortable entertaining applications from detainees who claim their arrest was illegal. For example, a Trial Chamber originally refused Stevan Todorovic an evidentiary hearing in relation to the circumstances of his arrest, *Prosecutor v Simic, Tadic, Zaric & Todorovic*, Decision Stating Reasons For Trial Chamber's Order Of 4 March 1999 On Defence Motion For Evidentiary Hearing On The Arrest Of The Accused Todorovic, 4 March 1999, IT-95-9, a decision upheld by the



Obviously, as the Rome Statute is not yet in force, there is no practice or jurisprudence upon which to comment. The Rome Statute does contain some provisions that may have a bearing on irregular rendition. By virtue of Article 55(1)(d) a suspect “shall not be subjected to arbitrary arrest or detention; and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute”.<sup>249</sup> This appears to make the irregular rendition of those under investigation contrary, not only to the human rights of the accused (as is the case for kidnapping), but also the Statute itself. Article 59(2) creates a duty upon the custodial State, prior to transfer, to ensure that the person has been “arrested in accordance with the proper procedure and... the person’s rights have been respected”.<sup>250</sup> These provisions may not be enough to prevent surrender of someone who a State seeks to render to the ICC without respecting the necessary procedures or human rights of the suspect. This conclusion follows from the custodial State’s duty to determine these matters “in accordance with the law of that State”.<sup>251</sup> A State accepting the *mda captus bene detentus* rule could possibly continue with the surrender, as although Article 59(2) specifically requires the court to ensure the correct process has been followed, the “process” referred to is the national one.<sup>252</sup> Nonetheless, it can be hoped that the existence of the Court, where actions will probably be publicly scrutinised at the international level, may deter abductions.<sup>253</sup> Its jurisprudence on the matter could also serve to clarify international law here.

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Appeals Chamber (*Prosecutor v Simic, Tadic, Zaric & Todorovic*, Decision On Appeal By Stevan Todorovic Against The Oral Decision Of 4 March 1999 And The Written Decision Of 25 March 1999 Of Trial Chamber III, 19 October 1999, IT-95-9-A). The decision was overturned, and the evidentiary hearing granted *Prosecutor v Simic, Tadic, Zaric & Todorovic* Decision, 23 November 1999, IT-95-9-T. At the time of writing there had been no decision on the arrest, although it has caused tension with SFOR, who have refused to divulge the circumstances of his arrest, see (2000) 184 *Tribunal Update*. The ICTY has released people where arrests have been based on mistaken identity such as Goran Lajic, *Prosecutor v Lajic* Order for the Withdrawal of Charges Against the Person Named Goran Lajic and for his Release, IT-95-8 17 June 1996.

<sup>249</sup> On Article 55(1)(d) see C.K. Hall, “Article 55” in Triffterer, *supra* n 727, pp.730-731.

<sup>250</sup> Rome Statute, Article 59(2)(b-c) See A. Schlunck, “Article 59” in Triffterer (ed.), *supra* n.88, 765.

<sup>251</sup> *Ibid.* Article 59(2).

<sup>252</sup> See Schlunck, *supra* n.250, p.768, who is of the opinion that this solely meant the warrant has been duly served. Also, in her opinion (*ibid.*) the rights referred to in 59(2)(c) are just that they are informed about the charges and the grounds for detention.

<sup>253</sup> For an argument that an ICC would limit the temptation for abduction see W.N. Giniaris, “The New World Order and the Need for an International Criminal Court” (1992-3) 16 *Fordham I.L.J.* 88, pp.109-110.

The Rome Statute provides for Pre-Trial Proceedings, in which the Pre-Trial Chamber is to ensure that the accused has been informed of his/her rights,<sup>254</sup> but this does not contemplate the raising of possible pre-existing violations of the accused's rights. The only reference to possible pre-trial violations of human rights is extended pre-trial detention due to "inexcusable delay by the prosecutor", and the remedy for this is the consideration of pre-trial release (as if on bail, not a withdrawal of charges).<sup>255</sup> The closest the Statute comes to dealing with the issue of irregular rendition is Article 85. This grants "anyone who has been the victim of an unlawful arrest or detention... an enforceable right to compensation". This would appear to cover a case of irregular rendition if "unlawful" also means under international law (including the Rome Statute). If so, it could be argued that as the Statute thus provides a remedy, this excludes the possibility of the ICC declaring arrest illegal and refusing to try that person. It is unlikely that the Court would take such an approach. What must be recalled is that in all cases where a court has refused to proceed to trial on the grounds of such procedural irregularity, it has done so on the grounds of the inherent power it has, as a court, to prevent abuses of process. This power is not based on statutory provision, but the inherent power of a court.<sup>256</sup> This option would probably be open to the ICC, and it may well follow the approach of the joint Appeals Chamber in asserting such a power. Even if they did not, this objection may not, in practice, prove too serious, as it is unlikely that a State would seek to surrender such a person to the court. The Court only comes into play when national courts are unwilling or unable to try such offences, and a State is unlikely to go to the lengths required for irregular rendition if it is unwilling or unable to prosecute that person domestically. As with extradition, we can see that the international courts may well improve the system of prosecution by limiting the necessity for, and excluding the operation of, irregular rendition, although, particularly for the ICTY, this is by no means certain.

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<sup>254</sup> *Ibid.* Article 60(1).

<sup>255</sup> *Ibid.* Article 60(4).

<sup>256</sup> See, for example, *Barayagwiza*, *supra* n.245.



## DIFFERENT STATES, DIFFERENT LAWS

International crimes are universal crimes, so it is axiomatic that they should be defined the same way in all jurisdictions. Unfortunately this has not been the case. Courts of various states have pronounced incorrectly on international law, in good faith or otherwise. On international law generally, US courts have shown a distinctly partisan bent. As Koh notes, there is a “line of recent Supreme Court precedent misconstruing international treaties”.<sup>257</sup> Their misconstructions have consistently not merely weakened the treaties, but interpreted them “to sanction precisely what the treaty was drafted to prevent”.<sup>258</sup> At this point, focus must fall on the structural reason why courts (in particular) have had immense problems identifying the international definitions of international crimes. As, in the bilateral system, one State (or a group of States) cannot impose their definition unilaterally,<sup>259</sup> differences in definitions have arisen. In the absence of broadly accepted definitions of them, courts have had to rely on custom, which can be vague. At times, it has been considered so vague, questions have arisen about whether it is possible, or consistent with the *nullum crimen sine lege* principle, to rely on custom for prosecutions.<sup>260</sup> This is understandable, but sometimes the critiques are overstated. Many of the arguments over customary law relating to international crimes relate to the customary or otherwise nature of treaty provisions (this is particularly so for war crimes), rather than on a *tabula rasa*. The content of the rules at issue, therefore are no more or less certain than the treaty rules, which are frequently incorporated, unaltered,

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<sup>257</sup> H.H. Koh, “The Haiti Paradigm in United States Human Rights Policy” (1994) 103 *Yale L.J.* 2391 at p.2416. referring to *Sale v Haitian Centers Council* (113 S.Ct. 2549 (1993)), *Volkswagenwerk Aktiengesellschaft v Schlunk* 486 US 694 (1988), *Societe Nationale Industrielle Aerospatiale v US District Court* 482 US 522 (1987) and *US v Alvarez-Machain*, *supra* n.231.

<sup>258</sup> *Ibid.*

<sup>259</sup> This is not necessarily a bad thing.

<sup>260</sup> See, e.g. Warbrick, *supra* n.180, p.965.

into domestic law.<sup>261</sup> Where the debate does not involve treaty rules, or the treaty rules themselves are very vague, these arguments have some currency.

Courts have had particular difficulty with crimes against humanity, which is unsurprising. Until recently, there was no broadly accepted detailed codification of their definition.<sup>262</sup> Two jurisdictions have recently attempted prosecutions for crimes against humanity and run into problems, namely Canada and France.

In Canada definitional problems abounded in *R v Finta*,<sup>263</sup> and in spite of overwhelming evidence, the courts did not record a conviction. Despite the statute being fairly clear that the provision was jurisdictional alone, the Canadian Supreme Court read it as creative of a national offence.<sup>264</sup> This led them down various legal blind alleys, most notably into a confusion of national and international requirements of *mens rea*, which they incorrectly decided in favour of national law. They then compounded this by using a standard in excess of that required in Canadian law.<sup>265</sup> In addition they misconstrued the requirements of the *actus reus*; requiring that the acts “shock the conscience of right thinking persons”.<sup>266</sup> Both elements of the crime were thus construed in a narrower way than in international law. The results of this were very serious, it has led to an abandonment of the attempt to prosecute Nazi offences in Canada. The government position paper released to explain its resort to extradition and denaturalisation was express; “[in *R v Finta*] the court established a higher standard of proof for the prosecution of war crimes and crimes against humanity than is recognised at international

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<sup>261</sup> For an example of this, see the UK Geneva Conventions Act 1957, which merely appends the Conventions as a schedule, and criminalises Grave Breaches.

<sup>262</sup> Although attention here focuses on crimes against humanity in national jurisdictions, issues also arise from the notoriously underdeveloped “general part” of international criminal law, which deals with the principles of liability.

<sup>263</sup> *R v Finta* 112 DLR (4th) 513. On this case see I Cotler “R v Finta” (1996) 90 *A.J.I.L.* 460; I. Cotler “Bringing Nazi War Criminals in Canada to Justice: A Case Study” (1997) 91 *Proc.A.S.I.L.* 262; I. Cotler, “War Crimes Law and the Finta Case (1995) 6(2d) *S.Ct.Rev.* 577; D. Matas, “The Case of Imre Finta” (1994) 34 *U.N.B.L.J.* 281, Williams *supra* n.212; C. Amerasinge, “The Canadian Experience” in M.C. Bassiouni (ed.), *International Criminal Law Vol. III: Enforcement* (New York: Transnational, 2nd ed. 1999) 243; M. Lippman, “The Pursuit of Nazi War Criminals in the United States and in Other Anglo-American Legal Systems” (1998) 29 *Cal.W.I.L.J.* 1, pp.29-32.

<sup>264</sup> *Ibid.*, p.592 (Cory J.), *contra* pp. 540-541 (la Forest), see Cotler “War Crimes Law”, *ibid.*, p.607-11.

<sup>265</sup> See Cotler, *ibid.*, pp.623-7.

<sup>266</sup> *Supra* n.263, p.593. See Cotler, *ibid.*, p.618.



law. For the World War II cases, this decision has made the prosecution of these crimes much more difficult and less likely”.<sup>267</sup>

If the majority in *Finta* were misguided, at times the French cases seem little less than definitionally perverse. Prior to 1992, when a statute was brought in to try to clear up some of the confusion caused by the courts, the courts were notionally applying the definition in Article 6(c) of the London Charter. However “the definition of crimes against humanity arrived at by the French courts through the twenty year litigation that the Touvier and Barbie cases went through was really quite different from anything found in 6(c) of the Nuremberg Charter”.<sup>268</sup> The reason for this is that the courts added a particular requirement to the definition of crimes against humanity, which had no place in the international definition, and had no coherent rationale.<sup>269</sup> The requirement was that the crime against humanity must have been committed in furtherance of a common plan instigated by a state practising a hegemonic ideology.<sup>270</sup> This was introduced in the *Barbie* case,<sup>271</sup> but reached it’s zenith in the *Touvier* litigation.<sup>272</sup> In addition to it being entirely extraneous to any international definition of crimes against humanity, it is hopelessly vague, and the courts did not attempt to elaborate the meaning of their innovation.<sup>273</sup> This addition is highly destructive of the definition, and, as Sadat-Wexler comments, makes the French definition of crimes against humanity so “distant from its international meaning as to arguably remove it from the province of international law.”<sup>274</sup> It must also be remembered that both of these jurisdictions have a stable political system and a well developed and professional judiciary, thus labour under none of the limitations that many

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<sup>267</sup> Cited in I. Cotler, “R v Finta” *supra* n.263, p.461.

<sup>268</sup> L. Sadat-Wexler, “Prosecutions for Crimes Against Humanity in French Municipal Law: International Implications” (1997) 91 *Proc.A.S.I.L.* 270, p.271. See also L. Sadat-Wexler, “The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Barbie to Touvier and Back Again” (1995) 32 *C.J.T.L.* 289; L. Sadat-Wexler, “The French Experience” in M.C. Bassiouni (ed.), *supra* n.263, 273, pp.288-292 also includes an analysis of the *Papon* trial, which seemingly, did not alter much in the legal interpretations discussed here.

<sup>269</sup> See C. Finkelstein, “Changing Notions of State Agency in International Law: The Case of Paul Touvier” (1995) 30 *Tex.I.L.J.* 261, p. 268; Sadat-Wexler (1995), *supra* n.268, pp.337-355.

<sup>270</sup> See Sadat-Wexler (1997), *supra* n.268, pp.271-3.

<sup>271</sup> Judgment of 20th December 1985 Cass. Crim. 1986 J.C.P. II G No 20,655.

<sup>272</sup> Particularly Decision of 13<sup>th</sup> April 1992, cited in Sadat-Wexler (1995), *supra* n.268, p.293.

<sup>273</sup> Sadat-Wexler, *ibid.*, p.359.

<sup>274</sup> *Ibid.*, p.273.

other societies operate with. Even they seemed to be incapable of coming up with definitions that comported with international law, or that were even similar.

A benefit of the proliferation of international criminal tribunals may be the effect their creation and operation has on the acceptance of the prohibitions in international criminal law in domestic jurisdictions. The mere fact of the existence of these tribunals alone will not alter State's pre-existing monistic or dualistic inclinations. Their influence may be less jurisprudentially profound, but nonetheless of considerable pragmatic significance. The founding documents and judgments of the tribunals contribute to, declare, and develop customary international law, for incorporationist States, this may amount to a directly enforceable corpus of law which may be used. For those States which refer to "war crimes" or "international crimes" or "crimes against humanity" without presenting a definition, or leaving the definition expressly to international law, then these developments will have an effect on those concepts, hopefully clarifying them, and increasing similarity in definitions between States.

Some of the international criminal tribunals have had a profound effect on customary international law. The Nuremberg Principles, which were developed by the ILC from the Nuremberg Charter and judgment are widely considered to represent customary international law.<sup>275</sup> The declaration, in the judgment of the Tribunal that the Hague Convention IV, the rules attached to it and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War are customary has been frequently cited as authoritative.<sup>276</sup> In contrast, the Tokyo IMT's discussion of law, insofar as it was not merely a recapitulation of that pronounced at Nuremberg, has not left such an imprimatur on

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<sup>275</sup> See *infra* pp.221-222.

<sup>276</sup> *Ibid.* see also, I. Blischenko, "Judicial Decisions as a Source of International Humanitarian Law" in A. Cassese (ed.) *The New Humanitarian Law of Armed Conflict* (Naples: Editoriale Scientifica, 1979) 41, L.C Green, *The Contemporary Law of Armed Conflict* (Manchester: MUP, 2<sup>nd</sup> ed., 2000) pp34, 113, 196, 291; G. Abi-Saab, "The 1977 Additional Protocols and General International Law: Some General Reflexions" in A.J.M Delissen & G.J. Tanja, *Humanitarian Law Of Armed Conflict: Challenges Ahead* (Dordrecht: Martinus Nijhoff, 1991) 115, p.116 asserts that the judgment on that aspect is "famous".



custom.<sup>277</sup> The main problem with the Nuremberg definitions was their vague nature however, which led to the problems discussed above.

The ICTY's Statute and judgments has contributed to the development and clarification of customary international law.<sup>278</sup> Its case law, especially the *Tadic* jurisdictional appeal,<sup>279</sup> has been iconoclastic, with much of its jurisprudence being adopted by States as declaratory of custom.<sup>280</sup> Decisions by the ICTY have been used by States not only in international negotiations,<sup>281</sup> but also in the preparation of their national military manuals.<sup>282</sup> A State's military manuals are intimations of what the State considers to be the customary position.<sup>283</sup> There have even been comments made to the effect that the ICTY focuses a little too much on elaborating the law and not enough on

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<sup>277</sup> There has not been such a take-up of the Tokyo IMT judgment. Before the building of the UN Tribunals the only references to the law of the Tokyo IMT in the International Law Reports are references to the Tokyo Charter, cumulatively to the Nuremberg Charter, in *re Albrecht* (1947) 14 *A.D.* 196, p.198 and *DPP v Poljukhovic* (1991) 91 *I.L.R.* 1 pp.46-7. Of the 7 speeches in *Pinochet*, only one mentioned the Tokyo Charter, again cumulatively to the London Charter. (Lord Phillips, *supra* n.89), in contrast four refer to the Nuremberg Charter (*supra* n.89). The UN Tribunals have used the Tokyo IMT's judgment as authority for the proposition that civilians may be convicted of war crimes, *Prosecutor v Delalic, Mucic, Delic & Landzo*, Judgment, 16 November 1998, IT-96-21-T, paras 357-358 (Hereinafter *Celebici*), in *Celebici* they supported their position with reference to the *Flick & Roehling* cases too, *ibid.* paras 359-62. This was followed in *Prosecutor v Akayesu*, Judgment, 2 September 1998, ICTR-96-4 although they did not consider the matter entirely settled (s 6.2). *Celebici* (*ibid* paras 368-370) and *Prosecutor v Aleksowski*, Judgment, 25 June 1999, IT-95-14/1-T (paras 77-78) case reject the Tokyo IMT's majority approach to command responsibility, which only required influence as opposed to requiring a superior/subordinate relationship.

<sup>278</sup> T. Meron, "War Crimes in Yugoslavia and the Development of International Law" (1994) 88 *A.J.I.L.* 78.

<sup>279</sup> *Prosecutor v Tadic*, Decision on the Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72.

<sup>280</sup> T. Meron, "The Continuing Role of Custom in the Formulation of Humanitarian Law" in T. Meron, *War Crimes Law Comes of Age* (Oxford: OUP, 1998) 262; *passim*, especially p.269; T. Meron, "The Normative Impact on International Law of the International Tribunal for the Former Yugoslavia" in *ibid.* 210; T. Meron, "War Crimes Law Comes of Age" (1998) 92 *A.J.I.L.* 462, p.464; T. Meron, "The Hague Tribunal: Working to Clarify International Humanitarian Law" (1998) 13 *A.U.J.I.L. & Policy* 1511; C. Greenwood, "The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia" (1998) 2 *Max Planck Y.B.U.N.L.* 97, pp.122-133; P. Akhavan, "The Dilemmas of Jurisprudence" (1998) 13 *A.U.J.I.L. & Policy* 1518; See also P.D. Alesky, "The Yugoslav War Crimes Tribunal and International Humanitarian Law" (1998) 35 *International Politics* 1, p.13; S.D. Murphy, "Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia" (1999) 93 *A.J.I.L.* 57, p.63.

<sup>281</sup> Meron confirms that the US position on certain crimes was influenced by the ICTY's jurisprudence *ibid* (*A.U.J.I.L. & Policy*), p.1538, the same can probably be said of Germany, see A. Zimmerman, "The Creation of a Permanent International Criminal Court" (1998) 2 *Max Planck Y.B.U.N.L.* 169, Zimmerman, a member of the German delegation makes frequent reference to ICTY & ICTR practice in his comments. See also D. Robinson, "Defining Crimes Against Humanity at the Rome Conference" (1999) 93 *A.J.I.L.* 45, p.45; D. McGoldrick, "The Permanent International Criminal Court: An End to the Culture of Impunity?" [1999] *Crim L.R.* 627, p.636 notes the impact of the *Tadic* Appeal in reversing the view that war crimes were limited to international conflicts. Bantekas claims that the *Celebici* judgment influenced Article 28 of the Rome Statute, I. Bantekas, "The Contemporary Law of Superior Responsibility" (1999) 93 *A.J.I.L.* 573, p.576. H. Von Hebel & D. Robinson, "Crimes Within the Jurisdiction of the Court" in Lee, *supra* n.88, 79, p.93 note the extensive use of the *Tadic* judgment in relation to the definition of crimes against humanity.

<sup>282</sup> W. Hays Parks, "Comments" (1998) 13 *A.U.J.I.L. & Policy* 1531, especially p.1532, "In my official capacity as, one of my jobs is to draft substantial portions of the new United States Joint Services Law of War Manual. It is going to be very comprehensive. I can tell you that the cases to date have been absolute gold mines of information to me. They have assisted me very substantially in my drafting".

<sup>283</sup> See A. Roberts & R. Guelff, *Documents on the Laws of War* (Oxford: OUP, 3rd ed. 2000) pp.12-13.



ensuring justice for the individual defendants.<sup>284</sup> Whatever the merits of that claim, the ICTY has made an unequivocal contribution to the development and elaboration of customary law. The ICTR's statute, where it differs from the ICTY's (principally on the express inclusion of war crimes in non international armed conflict) militated against the position still quite prevalent at the time, that war crimes were limited to international armed conflicts.<sup>285</sup> There are signs that the ICTR's case law has affected State's thinking on international crimes.<sup>286</sup> Evidence is sparser than that applicable to the ICTY, which may be attributable to the more recent nature of a majority of the ICTR's output. Current indications point to the Rome Statute appealing to States as providing a statement of customary law.<sup>287</sup> These developments are particularly important, as the Rome Statute, in particular contains very detailed, and broadly accepted, definitions of international crimes and general principles of liability. The French constitutional court is of the opinion that the definitions are detailed enough to overcome any *nullum crimen sine lege* issues.<sup>288</sup>

There is a second way in which the Rome Statute may promote equivalent definitions between States. There is anecdotal evidence that the creation of the two *ad hoc* tribunals has, through the increase in interest in international humanitarian law, led to States at least considering updating their legislation.<sup>289</sup> The creation of the ICC may assist in the

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<sup>284</sup> L.C. Green, "Drazen Erdemovic: The International Criminal Tribunal for the Former Yugoslavia in Action" (1997) 10 *L.J.I.L.* 363 p.376.

<sup>285</sup> See *infra*, pp.256-257.

<sup>286</sup> Zimmerman, *supra* n.282.

<sup>287</sup> Despite Article 10, as Charney states, it is "unavoidable" that something as rare as the Rome Statute will not influence the law, J. Charney, "Progress in International Criminal Law?" (1999) 93 *A.J.I.L.* 452, p.454; See also O. Triffterer, "Article 10" in Triffterer, *supra* n.88, 315, p.320, "from the practical point of view it can be expected that on subject matters the Statute deals with in a compromising way, such... development outside the possibilities provided for by review or an amendment to the Statute appears improbable". The Canadian draft Act, *supra* n.207, s6(4) provides "for greater certainty, crimes described in Articles 6,7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. There is no jurisprudence from the ICC, but it can be implied from Article 21(2) of the Statute that the Court is intended to create a consistent body of law, which should have knock on effects on the consistency of national prosecutions and law. On Article 21 see M. MaAuliffe de Guzman "Article 21" in Triffterer, *supra* n.88, 435, especially p.445. The Rome Statute has been cited as authority by the Trial Chamber in *Prosecutor v Furundzija*, Judgment, 10 December 1998, IT-95-17/1-T, para 216 and the Appeals Chamber, in *Prosecutor v Tadic*, Judgment, 15 July 1999, IT-94-1-A, para 291. This did not go unchallenged, Judge Shahabuddeen reserved his position on the matter (Separate Opinion of Judge Shahabuddeen, para 3) and the Trial Chamber in *Celbici* seemed uncomfortable with the Statute in relation to command responsibility, *supra* n.277, para 393.

<sup>288</sup> See B. Rudolf, "International Decisions: Statute of the International Criminal Court" (2000) 94 *A.J.I.L.* 391, pp.392-393.

<sup>289</sup> See T. Meron "Remarks" (1996) 90 *Proc. A.S.I.L.* 484, p.484, and D. Wembou, "The International Criminal Tribunal for Rwanda" (1997) 321 *I.R.R.C.* 685, p.692.



incorporation of international crimes into domestic legal systems. This is for a simple reason. If a State wishes to prevent its nationals (or offences occurring on its territory) being prosecuted in a very high profile international forum, then it must prosecute them itself. To do this, it must have the legal means at its disposal to prosecute such offences. As States are likely to prefer to investigate and prosecute these offences then this presents an incentive for States to incorporate the crimes enunciated in the Rome Statute.<sup>290</sup>

The benefit of increased incorporation will accrue from the coming into being of the ICC. It may extend beyond the States party. Non-party nationals can become subject to the jurisdiction of the Court, if they commit a crime within its jurisdiction on the territory of a State party to the Statute.<sup>291</sup> So, non-party States may consider it expedient to introduce such legislation, to ensure that they could prosecute their nationals for international crimes as defined in the Rome Statute, to prevent them being tried at the international level.<sup>292</sup> This is a significant move towards ensuring States take the prohibitions contained therein seriously. Another positive aspect of this could be that a fairly uniform corpus of law is in place over a large number of States, thus alleviating the problems identified above about the non-standard nature of national implementation of international criminal law.

Unfortunately, the definitions of crimes in the Rome Statute only partially reflect pre-Rome customary international law. Also, the ambit of prohibited conduct within the Rome Statute is at times more limited than customary law.<sup>293</sup> As a result, States are likely to enshrine versions of international crimes into their national law which are more limited than general international law. There may also be a further problem. The view is often

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<sup>290</sup> This incentive has also been noticed (independently) by David Turns, See D. Turns, "Prosecuting Violations of International Humanitarian Law: The Legal Position in the United Kingdom" (1999) 4 *J.A.C.L.* 1, p.3.

<sup>291</sup> In the absence of a duty to prosecute, this does not violate international law.

<sup>292</sup> That way, if they could get their extradition request in early, they could take precedence over the ICC. The US approach, is unlike this, being to hobble, or bring down the court if there is any possibility of any of its national being called to account before the ICC for crimes committed overseas.

<sup>293</sup> See chapters 4 and 5, *passim*.

taken that what is not expressly prohibited is legitimate.<sup>294</sup> Because of the incomplete list of war crimes, war crimes not contained in the Statute will not only become sidelined at the international level, but also in national jurisdictions, rendering war crimes not contained in the Rome Statute prone to being overlooked.

In cases where the Rome Statute's definitions are narrower than customary law, and where defences are more widely drawn than international law requires, it is feasible that a person would be entitled to an acquittal under the Rome Statute, or national laws following it, when general international law would not require such a result. One characteristic of sham trials, which the ICC is being set up to combat, is the "creation" of exonerations to justify otherwise illegal conduct. Ironically, in some cases this is precisely what the Rome Statute does. The trade off between the level of incorporation and the fidelity to international law of that which is incorporated has, in some cases been unambiguous. In others, this bringing of an additional pressure to bear on States to incorporate international legal norms may prove felicitous.

## CONCLUDING REMARKS

There is a clash of values in the current international system. The schism is between the traditional "billiard ball" bilateral-sovereignty based approach, and the more modern ideas of the system. In the former, States are considered to be in an Hobbesian state of nature, and international law is merely to regulate their external relations, which exists solely to facilitate relations between States. In the latter, the international system is considered to protect different values, which tend to inhere in the human person, as well as State interests. The primarily bilateralist nature of the structure of the international

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<sup>294</sup> This is not just to say that the *Lotus* presumption of State freedom (SS. *Lotus* (France v Turkey) (1927) PCIJ Series A, No.10, the status of which is still contested, may be applicable, but that which is not prohibited is considered *legitimate*. See P. Allott, "State Responsibility and the Unmaking of International Law" (1988) 29 *Harv. I.L.J.* 1, p.16, also C. af Jochnik & R. Normand, "The Legitimation of Violence: A



system is not entirely compatible with the concept of (universal) international crimes, as their effective repression requires a larger degree of cooperation than traditionally has been the norm. It is no surprise that the modern trend towards prosecution arose from activities of the (effectively) universal organisation, the UN, which has the power to impose duties to cooperate, even on the ambivalent or unwilling.

It has been the aim of this chapter to show how this tension between the old and new conceptions of international order have been played out by reference to some of the practical problems States have faced enforcing universal crimes in the bilateral world, and the extent to which the new institutionalisation has, or has not improved matters. The record is mixed. At times, it would appear that the new values have come out on top. For example, State immunity for international crimes has been rejected, with the necessity of repressing international crimes winning out over the idea of equal sovereign States not interfering with each other's affairs. On the other hand, for national courts, the rules on personal immunities still appear inviolate.

Many of the problems stem directly from the absence of coordinating or supervisory mechanisms, that can encourage prosecution, clarify laws and resolve disputes that arise over jurisdiction. There have been some successes here, with the UN tribunals, in particular acting under their primacy powers, resolving difficult jurisdictional questions on the legal plane. The absence of enforcement mandate has created problems in the world of practicality. The same can be said for extradition, which in its traditional form is a microcosm of the problems of a bilateral world. The two UN tribunals, have overcome the patchwork coverage of extradition relations, and the conditions of extradition, which are ill suited to international crimes. The ICC, despite having a smaller bailiwick in which to order cooperation, has also overcome many of the problems of bilateralism, despite its retention, in attenuated form, of one of the extradition conditions. The ICTY and ICC have made particularly strong contributions to clarifying the law, making many of the

fears of imprecise customary definitions less real. The Rome Statute's creation of a powerful reason to incorporate the crimes over which it has jurisdiction should improve national incorporation of international crimes. Despite the caveats relating to the content of those crimes, increased levels of incorporation will have knock on effects of dual criminality, when it is invoked in bilateral extraditions. Perhaps the largest contribution made by the three modern tribunals is their functional analogues to the duty to extradite or prosecute. The absence of a broad, customary duty to extradite or prosecute suspected international criminals is an ugly manifestation of the traditional system of international order. The creation, for offences over which they have jurisdiction, of international criminal courts is a sea change in the approach to international crimes. The ICC's position on this could, for States party to its Statute, become a cornerstone of effective prosecution and repression of international crimes.



# PART 3: SELECTIVITY IN, AND NON-PROSECUTION OF, INTERNATIONAL CRIMES

# CHAPTER 4: SELECTIVITY AND NON-PROSECUTION: JURISDICTION *RATIONAE* *PERSONAE*

## INTRODUCTION

It would be fatuous to pretend that enforcement of international criminal law has been consistent, uniform, or, in many instances, even attempted. Whilst the cases discussed at the end of chapter 3 have serious failings in their interpretation of international law,<sup>1</sup> they still stand out as examples of attempts to enforce international criminal law. The general trend has not been towards enforcement, but conversely, towards non-prosecution of even the most egregious offences. For example, the atrocities in Stalin's Gulags, the Chinese "Cultural Revolution" and, until recently, the crimes of the Khmer Rouge and the vast majority of offences from the various military coups in the 1970s in Latin America have been met with an ominous silence from the judiciary, both national and international. The problem of enforcement is the most pressing, by far, of the problems facing international criminal law. The lacunas in substantive international criminal law cannot be ignored,<sup>2</sup> but the challenges they present pale into insignificance when compared to the under-enforcement of those rules. War crimes law may have, in Meron's phrase "come of age",<sup>3</sup> but its enforcement has not, as yet, reached adolescence.

Even when enforcement of international criminal law has occurred, in many instances, it has been done in a selective manner, with only certain offences by certain types of defendants being prosecuted. Normally those which are prosecuted are those

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<sup>1</sup> *Supra* pp.148-150.

<sup>2</sup> On which see S.R. Ratner, "The Schizophrenias of International Criminal Law" (1998) 33 *Tex.I.L.J.* 237.

<sup>3</sup> T. Meron, *War Crimes Law Comes of Age* (Oxford: OUP, 1998).



which are committed by, or on behalf of, other entities than the prosecuting State.<sup>4</sup> There are two methods of selective enforcement. One method is selectivity *rationae personae*, i.e. limiting the jurisdiction of courts enforcing international crimes to certain conflicts, or sides in those conflicts, so to prevent other similar offences being prosecuted. The other method is selectivity *rationae materiae*. This appears in two forms. First, by limiting the jurisdiction of courts to certain types of offences, when other, equally serious offences are not included, or by defining crimes more narrowly than international law. Doing this excludes liability for acts which are actually criminal under international law. Second, by defining crimes in excess of international law's criminal prohibitions, to ensure conviction when that is the desired outcome. This chapter will concentrate on selectivity *rationae personae*. A discussion will also be entered upon of some of the reasons why States choose to only prosecute certain categories of offenders, or none at all. This will include the extent to which these reasons have played themselves out at the international level, and whether or not international prosecutions have served to turn the tide in favour of prosecution, or provided responses to the problems facing States in prosecuting international crimes. Chapters 5 & 6 will relate to selectivity *rationae materiae*. A lengthy discussion of this matter is required as the selectivity is more subtle. For international courts, the discussion will also require a distinction between the courts based on the likelihood of the courts exercising jurisdiction over their creators.

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<sup>4</sup> On this "distancing" function, by which prosecutions of international crimes are used, in a didactic fashion, to emphasise the difference between the prosecuting State and international criminals, see G Simpson, "War Crimes: A Critical Introduction" in T.L.H. McCormack & G.J. Simpson, *War Crimes Law: National and International Approaches* (The Hague: Kluwer, 1997) 1, pp.24; Criticisms of similar (*mutatis mutandis*) motives for the creation of the two UN Tribunals have been made, with some justification, by José Alvarez, J. Alvarez, "Crimes of Hate/Crimes of State: Lessons from Rwanda" (1999) 24 *Yale J.I.L.* 365, p.411, "current international prosecutions are intended to exculpate the international community that permitted atrocities to occur but is now trying their perpetrators".

## SELECTIVITY *RATIONAE PERSONAE*

It is a fundamental requirement of the rule of law that the law should be applicable to all persons within a State's jurisdiction,<sup>5</sup> not merely to a certain group. Just as laws should be generally applicable, enforcement must be evenhanded. It is a fundamental requirement of equality before the law that laws (and, by extension, their enforcement) must be general. The notion of equality before the law is not only a human right,<sup>6</sup> but also the principle that like cases must be decided in a like fashion is a fundamental axiom of law.<sup>7</sup> Selectivity undercuts this axiom, giving rise to the impression that when a decision is made to prosecute or not, conditions other than the acts themselves are being taken into account. The idea of universal crimes conflicts with the selective enforcement. As such offences are universally applicable when enforcement is selective, the law, or those invoking it, appear hypocritical.

An examination of State practice reveals highly selective enforcement of international crimes, at least until very recently. This has occurred in various ways. The first of these is by legislation. Many States do have adequate, if under-used, legislation in place for war crimes and genocide.<sup>8</sup> Others, though do not fare so well. The Acts brought in by the UK and Australia for prosecution of World War II offences all effectively prevent Allied actions being prosecuted.<sup>9</sup> The UK War Crimes Act 1991 was brought into deal with the possibility of Axis offenders being found in the UK, and jurisdiction is limited to offences committed "in a place which at the time was part of Germany or under German

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<sup>5</sup> See Simpson, *supra* n.3, p.11.

<sup>6</sup> 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Article 14(1) "All persons shall be equal before the courts and tribunals".

<sup>7</sup> See M. Loughlin, *Sword and Scales* (Oxford: Hart, 2000) p.20.

<sup>8</sup> The UK Geneva Conventions Act 1957 and Genocide Act 1969 both define the crimes, with correct jurisdictional provision in accordance with the Geneva Conventions and the Genocide Convention, but remain dormant, see D. Turns, "Prosecuting Violations of Humanitarian Law: The Legal Position in the United Kingdom", (1999) 4 *J.A.C.L.* 3; P. Rowe & M. Meyer, "The Geneva Conventions (Amendment) Act 1995: A Generally Minimalist Approach" (1996) 45 *J.C.L.Q.* 476. The Finnish legislation appears satisfactory, including war crimes, genocide and crimes against humanity, see Chapter 13 Finnish Penal Code, Articles 1-5, Chapter 1 Article 3 (9887/1974, 1975 Code). See L. Hannikainen, R. Jhanski & A. Rosas, *Implementing Humanitarian Law Applicable in Armed Conflicts: The Case of Finland* (Dordrecht: Martinus Nijhoff, 1992) p.116.

<sup>9</sup> The analogous Canadian Legislation, includes provisions granting jurisdiction over Canadians (Canadian Criminal Code R.S.C. 1985 c-C46, 3.71.



occupation”.<sup>10</sup> Although this could notionally cover alleged Allied offences such as the bombing of Dresden the possibility of charges against Allied soldiers for such offences is remote. It could also exclude any responsibility of leaders outside of Germany or the occupied territories. The Australian legislation is expressly selective, limiting jurisdiction to the European sphere of World War II,<sup>11</sup> where few Australians fought.

Some case law has also effectively prevented prosecution outside of a very small ring of people. The French incorporation of Article 6(c) of the Nuremberg IMT Charter was held, in the *Boudarel* case, to be limited only to offences by the Axis powers in World War II.<sup>12</sup> This excluded any claims relating to French war crimes in Indochina. This was in accordance with the view of the French government, which confirmed the judgment.<sup>13</sup> This has prevented any prosecution for anything other than Axis officials (which, since *Papon* admittedly now includes those acting under orders of the Vichy regime). Prior to the *Papon* judgments,<sup>14</sup> the French Court’s criterion of the acts being undertaken under the direction of a State following a hegemonic ideology was held, against the historical record, to exclude the crimes committed under the Vichy regime, on the ground that it was not hegemonic.<sup>15</sup> It is interesting to note that even this decision was after the first apologies by the French State for the activities of the Vichy regime, and acceptance that many French people had worked for it.

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<sup>10</sup> War Crimes Act 1991 s1(a). See D. Turns, “Prosecution Violations of International Humanitarian Law: The Legal Position in the United Kingdom” (1999) 4 *J.A.C.L.* 1, pp.21-23; J. Garwood-Cutler, “The British Experience” in M.C. Bassiouni (ed.) *International Criminal Law Vol. III: Enforcement* (New York: Transnational, 2<sup>nd</sup> ed. 1999) 325; G. Ganz, “The War Crimes Act 1991-Why no Constitutional Crisis?” (1992) 55 *M.L.R.* 87; A.T. Richardson, “War Crimes Act 1991” (1992) 55 *M.L.R.* 73; C. Greenwood, “The War Crimes Act 1991” in H. Fox & M.A. Meyer (eds.), *Armed Conflict and the New Law: Effecting Compliance* (London: British Institute of International and Comparative Law, 1993) 215; E. Steiner, “Prosecuting War Criminals in England and France” [1991] *Crim. L.R.* 180.

<sup>11</sup> War Crimes Amendment Act 1988, s.5, See generally G. Triggs, “Australia’s War Crimes Trials: A Moral Necessity or Legal Minefield?” (1987) 16 *Melbourne U.L.J.* 382; G. Triggs, “Australia’s War Crimes Trials: All Pity Choked” in McCormack & Simpson, *supra* n.3, 123. On the Australian prosecutions under this act see G. Blewitt, “The Australian Experience” in Bassiouni (ed.), *supra* n. 301; D. Bevan, *A Case to Answer* (Kent Town, Australia: Wakefield Press, 1994).

<sup>12</sup> Judgment of the *Cour d’ Cassation* 1 April 1993, see A. Marschik, “The Politics of Prosecution: European National Approaches to War Crimes” in McCormack & Simpson, *supra* n.3, 65 pp.85-86; L. Sadat Wexler, “The French Experience” in Bassiouni (ed.), *supra* n.10, 273, pp.273-274.

<sup>13</sup> See Sadat-Wexler, *ibid.*

<sup>14</sup> Judgment of *Chambre d’Accusation de la Cour d’Appel de Bordeaux*, 18 September 1996, Judgment Cass. *Crim* 23 Jan 1997. On the decisions, see Sadat-Wexler, *ibid.*

<sup>15</sup> See Sadat-Wexler, *ibid.*, p292.

It is very interesting that, when it comes to prosecution, what little there has been has been limited mostly to “others”, either those of discredited past regimes, (such as in Argentina,<sup>16</sup> Ethiopia and France), or foreigners, (mainly Nazis, but now including ex-Yugoslavs and Rwandans). Only very rarely (but increasingly, as the recent Belgian<sup>17</sup> prosecutions of their own peacekeepers show) has a country tried international crimes committed by citizens of that country, for offences committed under the current regime. Even when they have done so, for example as in the *Calley* case, there has been great ambiguity of purpose and result. In the *Calley* case President Nixon intervened to personally review the record and effectively ended his sentence.<sup>18</sup>

Selectivity is a phenomenon which has plagued international criminal tribunals from their inception to date. None of them have been endowed with universal jurisdiction which can be exercised free from external constraint.

The Nuremberg and Tokyo tribunals were quite clearly the embodiment of selectivity. It in no way minimises the crimes of the Nazi or Imperial Japanese regimes to note that the criticisms of both those tribunals under the general heading that they were “victor’s justice”, i.e. that they chose to apply the supposedly universal law (which they defined, in excess of what international law had previously criminalised) only to the actions of the defeated enemies are largely accurate and legitimate.<sup>19</sup> Not only was the law applied only to the defeated powers, and selectively in relation to them too,<sup>20</sup> but the law itself was structured to avoid scrutiny of the Allies’ past actions.<sup>21</sup>

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<sup>16</sup> See the judgment, (1987) 8 *H.R.L.J.* 368; A. Garro, “Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?” (1993) 31 *C.J.T.L.* 1.

<sup>17</sup> *D.A. v Osman* Conseil de Guerre de Bruxelles, arrêt du 21 Décembre 1994, Cour Militaire, ch. perm. néerl; arrêt du 24 Mai 1995. On the other hand, Charlesworth & Chinkin question the acquittals in some of the Belgian cases, H. Charlesworth & C. Chinkin, *The Boundaries of International Law* (Manchester: MUP, 2000) p.297.

<sup>18</sup> See A.P. Rubin, *Ethics and Authority in International Law* (Cambridge: CUP, 1997) p.175; M. Bilton & K. Sim *Four Hours in My Lai* (Harmondsworth: Penguin, 1993) Ch11. Levie describes this intervention as “unquestionably a miscarriage of justice and one which will return to haunt the United States.” H. Levie, *Terrorism in War: The Law of War Crimes* (New York: Oceana, 1992) p.207.

<sup>19</sup> See D. Luban, “The Legacies of Nuremberg” (1987) 54 *Social Research* 779, pp.809-811.

<sup>20</sup> B.V.A. Röling “The Nuremberg and Tokyo Trials in Retrospect” in M.C. Bassiouni & V. Nanda, *A Treatise on International Criminal Law* (Springfield, Illinois: Thomas, 1973) 590, p.591 gives the very pertinent example of the absence of population centre bombings from the Nuremberg indictment. The absence is likely to be



For the UN tribunals, selectivity has arisen, albeit in a different fashion. For both of these tribunals the claim that they are set up to judge the “losers” is inapposite, as neither was set up by a belligerent, but by the UN.<sup>22</sup> Selectivity is relevant to the jurisdiction of both Tribunals. The ICTY has had to come to terms with allegations of selective application of its law because of the political impossibility of indicting any nationals of NATO countries for their actions subject to the jurisdiction of the ICTY.<sup>23</sup> This operates, post-Kosovo, to give rise to uncertainties about whether the ICTY will become an instrument of victor’s justice, in that the standards it seeks to apply can only be enforced against the actions of a weak State, possibly at the behest of a stronger one.<sup>24</sup> A different permutation of the selectivity argument could be made about the temporal jurisdiction of the ICTR. Alvarez has criticised the decision not to extend the ICTR’s jurisdiction back before 1994 in the following terms: “[b]roader jurisdiction for the ICTR could well have led to inquiries that would have embarrassed either the UN as a whole or a particular

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referable to the fact that it was a tactic also employed by the Allies. It is now not doubted that the refusal to indict the Emperor in the IMTFE was politically motivated (see M.C. Bassiouni, “From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Criminal Court” (1997) 10 *Harvard H.R.L.J.* 11, p.35; A.C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trial* (New York: William Morrow, 1987) pp.77-78, R. Minear, *Victor’s Justice, The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971) pp.111-113; J. Piccigallo, *The Japanese on Trial* (Austin: University of Texas Press, 1979) p.16.). In addition, the refusal to indict the notorious Unit 731 would appear to be related to the wish of at least one of the US or USSR to obtain their results (see B.V.A Röling & A. Cassese, *The Tokyo Trial and Beyond* (Cambridge: Polity Press, 1992) p.18; Levie, *supra* n.18. pp.154-155, who shares the blame between them. Yuki Tanaka reports that the USSR did give the US their information, and asked the US to join them in a joint investigation into Unit 731, which the US refused, putting the inaction down to US agreement with the accused not to prosecute them in return for information, Y. Tanaka *Hidden Horrors: Japanese War Crimes in World War II* (Boulder: Westview, 1998) pp.159-160. The refusal to indict organisations in the IMTFE (or include a provision in the IMTFE Charter allowing such an indictment to be laid) appears, to one commentator to be related to MacArthur’s policy decision that US interests would be best served by fostering good relations with intelligence, industrial and political groups, see R.J. Pritchard, “The International Military Tribunal for the Far East and the Allied National War Crimes In Asia” in Bassiouni (ed.), *supra* n.10, 109 p.124.

<sup>21</sup> For example, Robert Jackson, when drafting the provision on crimes against humanity, was aware that if the jurisdictional limit to war was not introduced, not only could colonialism (embarrassing for France and the UK), or the Gulags (still a secret in the USSR) be evaluated with reference to the law, but so could the segregationist policies in the US, see Luban, *supra* n.19, pp.787-788. This reluctance to use law which could rebound upon its authors is not unnatural, as Bassiouni puts it, “governments are not particularly inclined to criminalize the conduct of their high officials” M.C. Bassiouni, “The Normative Framework of Humanitarian Law, Overlaps, Gaps and Ambiguities” (1998) 8 *Transnational L. & Contemporary Problems* 199, p.202.

<sup>22</sup> Although this is not to say that the UN was uninvolved in either conflict.

<sup>23</sup> See *supra* chapter 2, pp.88-89.

<sup>24</sup> It must not be forgotten that the Security Council could, at a moments notice, decree the ICTY out of existence (See L. Sadat-Wexler, “The Proposed International Criminal Court” (1996) 29 *Cornell I.L.J.* 665, p.712). As three of the 5 permanent members were involved in the NATO action against the FRY, this must operate as a limit on the extent to which the Prosecutor could subject the actions of NATO force to appraisal, as the furore over her decision to have a report prepared on NATO actions showed, (1999) 158 *Tribunal Update*.

permanent member of the Security Council [France]”.<sup>25</sup> This criticism is possibly well founded, although even the limited jurisdiction of the ICTR has led to embarrassing questions, and answers.<sup>26</sup>

The jurisdictions of both tribunals are not immune to assertions of differential application of the law. Both are specific reactions to limited areas and conflicts. Where there is agreement on the acceptability of a tribunal amongst the permanent five members of the Security Council, the possibility of an international tribunal is there. Where it is not, either as there is insufficient interest to make proposals for a tribunal<sup>27</sup> or if the interests of any one of those powers is implicated,<sup>28</sup> then quite simply there will not be a tribunal. In terms of the gravity of offences, like incidents are not being treated alike, and as such, the *ad hoc* nature of the tribunals leaves them open to charges of exceptionalism.<sup>29</sup>

The Rome Statute could be on firmer ground on this respect,<sup>30</sup> but due to its jurisdictional regime, the ICC is far from perfect. When it comes into existence, the ICC will have jurisdiction over a larger personal, temporal and geographical range than the UN Tribunals, but States can choose to remain outside of this regime to a large extent by simply not signing the Statute or agreeing to its jurisdiction under Article 12(3).<sup>31</sup> On the other hand, States not Party to the Statute cannot exempt themselves completely, as if their nationals commit offences criminalised under the Rome Statute on the territory of States party to the Statute, they may be prosecuted. In this respect non-parties may be

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<sup>25</sup> Alvarez, *supra* n.4, p.397.

<sup>26</sup> The UN has accepted a degree of responsibility for the events in Rwanda, following the *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, 15<sup>th</sup> December 1999.

<sup>27</sup> An example of this type of situation is the conflict in the Congo.

<sup>28</sup> The conflict in Chechnya is a case in point, see A.P. Rubin, “Dayton, Bosnia and the Limits of Law” (Winter 1996/7) 47 *The National Interest* 41, pp.42-43.

<sup>29</sup> See, Alvarez, *supra* n.4, pp.452-456.

<sup>30</sup> Bothe argues that this undermines claims that the ICC will be a natural outcropping of the UN Tribunals, as they were what he terms “safe” mechanisms (i.e. ones which do not threaten to prosecute the actions of their creators), M. Bothe, “International Humanitarian Law and War Crimes Tribunals: Recent Developments and Perspectives” in K. Wellens (ed.) *International Law: Theory and Practice* (The Hague: Kluwer, 1998) 581, p.593.

<sup>31</sup> Which they have a right to do: “there is no obligation for a State to become party to a treaty it does not like, even if many or most other states do”, P. Malanczuk, “The International Criminal Court and Landmines, What are the Consequences of Leaving the US Behind?” (2000) 11 *E.J.I.L.* 77, p.78. The effect on non-Party States is probably the most controversial aspect of the Rome Statute, see, for example, D. Scheffer, “The International Criminal Court: The Challenge of Jurisdiction” (1999) 63 *Proc. A.S.I.L.* 68, p.69, “The single



worse off than parties, who are entitled, under the very controversial Article 124, to “opt-out” of the jurisdiction of the Court for war crimes, for seven years.<sup>32</sup> The United States, in particular, has been fiercely critical of the ICC’s jurisdiction over non-parties who have not specifically agreed to the Court exercising jurisdiction,<sup>33</sup> even though as a matter of international law, it is unobjectionable.<sup>34</sup> As the ICC does not have an independent ability to utilise universal jurisdiction the spectre of selective prosecution will hover over it. For the Court to be able to move beyond its bailiwick of the territory and nationals of States party (or those who have, on an *ad hoc* basis, agreed to its jurisdiction) a situation must be referred to it by a positive resolution of the Security Council.<sup>35</sup> As the Security Council is a body that functions for political reasons, and sees itself as being under no duty to act whenever and wherever international crimes are committed, any references it makes will raise the memory of those it has not referred. All exercises of jurisdiction by the ICC, whether over the territory or nationals of States parties or not, are subject to a certain level of control by the Council. The Council has been granted the right to demand postponement of action by the Court for as long as it can maintain the necessary positive

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most problematic part of the Rome treaty is Article 12”; S.A. Williams, “Article 12” in O. Triffterer (ed.), *Commentary on the Rome Statute for the International Criminal Court* (Baden-Baden, Nomos, 1999), 329, p.329.

<sup>32</sup> See A. Zimmermann, “Article 124” in Triffterer (ed.) *ibid.*, 1281.

<sup>33</sup> This is the underlying position of the US, who currently are unlikely to sign or ratify the Statute, that the nationality State should, essentially, have a veto over the Court’s jurisdiction when that State is a non-party, D.J. Scheffer, “The International Criminal Court: The Challenge of Jurisdiction” *supra* n.31, p.71; R. Wedgwood, “The International Criminal Court: An American View” (1999) 10 *E.J.I.L.* 93, p.99. On the US position see, for example M. Zwanenberg, “The Statute for an International Criminal Court and The United States: Peace Without Justice” (1999) 12 *L.J.I.L.* 1; M. David, “Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law” (1999) 20 *Mich. J.I.L.* 337; H.T. King & T.C. Theofrastous, “From Nuremberg to Rome: A Step Back for US Foreign Policy” (1999) 31 *Case W.R.J.I.L.* 47; B.S. Brown, “U.S. Objections to the Statute of the International Criminal Court: A Brief Response” (1999) 31 *N.Y.U.J.I.L. & Politics* 855; C.C. Joyner & C. Posteraro, “The United States and the International Criminal Court, Rethinking the Struggle Between National Interests and International Justice” (1999) 10 *Crim. L.F.* 359 p.366 refer to the “paranoia about US soldiers being prosecuted for war crimes in the course of international peacekeeping duties”; M.C. Bassiouni “Untitled” (1998) 13 *American University I.L.R.* 1400, p.1401, “those from the department of defense are more interested in guarantees that no American personnel will ever be prosecuted by the ICC”; J. Bolton, “Courting Danger: What’s Wrong With the International Criminal Court” (Winter 1998/99) 55 *The National Interest* 60, p.63 goes further, saying that one of the real worries is that the National Security Council could become subject to its jurisdiction. See also Malanczuk, *supra* n.31, p.80 & p.82: “I am much more disturbed by the basic assumption that seems to underlie the argument, beyond the particular issue of the application of Article 12, namely that if US soldiers commit war crimes abroad during their ‘global presence’, as a matter of principle, they should remain exempted from the jurisdiction of international tribunals and prosecuted only by US courts. Whether this is really an effective and objective remedy may sometimes be doubted”, & p.83.

<sup>34</sup> *Supra* pp.94-98.

<sup>35</sup> *Supra* p.90.

votes for a resolution requesting the Court to do so.<sup>36</sup> This allows a large element of politically inspired selectivity to remain surrounding prosecutions of international crimes, something the Rome Statute was meant to combat.<sup>37</sup>

Taking into account the critiques of the international criminal courts discussed above, McCormack's (pre-Rome) comment remains relevant, if a little overstated: "[t]his self righteous tendency to apply a different set of principles of international justice to one's own nationals, and the corresponding willingness to promote collective international responses when some 'other' entity is involved, is as evident in current national positions in relation to the proposed permanent international criminal court as it was in the attitudes of the Allied powers establishing Nuremberg and Tokyo".<sup>38</sup> In lumping all States together, McCormack goes a little too far, in particular bearing in mind the efforts of the "Like Minded States" to ensure the creation of a strong and effective court. We must also remember the massive leap that has occurred from even a few years ago as, "nobody... even after the establishment of the ICTY and the ICTR, dared to hope that before the end of the millennium a *permanent* International Criminal Court could be established".<sup>39</sup> Nonetheless, the internationalism of many States remains limited, and

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<sup>36</sup> On Article 16 generally, see M. Bergsmo & J. Pejic, "Article 16" in Triffterer, *supra* n.31, 373; L. Yee, "The International Criminal Court and the Security Council: Articles 13(b) and 16" in R.S. Lee (ed.) *The International Criminal Court* (The Hague: Kluwer, 1999) 143, pp.149-152; F. Berman, "The Relationship Between the International Criminal Court and the Security Council" in H. von Hebel, J.G. Lammers & J. Schukking (eds.), *Reflections on the International Criminal Court* (The Hague: Kluwer/T.M.C. Asser Press, 1999) 173, pp.176-178. Berman, head of the UK delegation accepts that it is a "departure from pure principle". See also A. O'Shea, "The Statute of the International Criminal Court" (1999) 116 *S.A.L.J.* 243, p.249, who criticises the Article, as the idea that a political body may interfere in such a manner is unknown in democratic States; G.H. Oosthuizen, "Some Preliminary Remarks on the Relationship Between the Envisaged international Criminal Court and the UN Security Council" (1999) XLVI *N.I.L.R.* 313, p.330; V. Gowlland-Debbas, "The Functions of the United Nations Security Council in the International Legal System" in M. Byers, (ed.) *The Role of Law in International Politics* (Oxford: OUP, 2000) 277, p.297.

<sup>37</sup> See Rome Statute preamble, US proposals to entirely subordinate the ICC to the Security Council are thought by many (and probably with good cause) to stem from a fear of possible prosecutions of US nationals for war crimes. See Joyner & Posteraro, *supra* n.33.

<sup>38</sup> T.L.H. McCormack, "Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law" (1997) 60 *Albany L.R.* 681, pp.719-720.

<sup>39</sup> O. Triffterer, "Preliminary Remarks: The Permanent ICC-Ideal and Reality" in Triffterer, *supra* n.31, 17, p.47. See also D.J. Harris, "Progress and Problems in Establishing an International Criminal Court" (1998) 3 *J.A.C.L.* 1, p.2: "even a decade ago, the idea of an International Criminal Court was not a serious item of the political agenda"; C. Warbrick, "International Criminal Law" (1995) 44 *I.C.L.Q.* 466, p.466 notes the difference between the 3<sup>rd</sup> and 4<sup>th</sup> editions of Harris' *Cases and Materials on International Law*, in the latter, the excerpts from Nuremberg were removed, Warbrick opines that few would question the excision. See also I Brownlie, *Principles of Public International Law* (Oxford: Clarendon, 4<sup>th</sup> ed. 1990) p.563-564, "in spite of extensive consideration of the problem in committees of the General Assembly the likelihood of setting up an international criminal court is very remote", *contra* I. Brownlie, *Principles of Public International Law* (Oxford:



many are far more willing to set up courts for others than a court that could force them to engage in self-reflection.

## WHY STATES DO NOT PROSECUTE INTERNATIONAL CRIMES

### INTRODUCTION

Having discussed the phenomenon of selective enforcement of international criminal law, where such enforcement exists, it is necessary to examine the causes of these problems to see if international enforcement can provide a solution, or if the causes of selectivity in national enforcement are operative at the international level.

The difficulties of prosecution fall into two categories, financial/practical and political. Within those categories there are separate problems. On the financial/practical level, in addition to cost, and the problems arising out of patronage which surround discretionary funding, there is the simple practical problem of finding enough lawyers competent in international criminal law. Political controversies surround international criminal prosecutions. They can be separated into three issues. First, the continued belief by States that prosecution of international crimes alleged against another State's nationals is a form of interference in that State's affairs (the "interference argument"). Second, the fear that prosecution of international crimes of others could draw attention to offences committed by the nationals or officials of the prosecuting State in the past (the "clean hands" argument). The third set of problems are particular to States trying offences by their own nationals.

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Clarendon, 5<sup>th</sup> ed. 1998) p.568, "Unease in the face of creation of *ad hoc* tribunals has given an impetus to plans for a creation of an international criminal court, and on 18 July 1998 the Rome Conference concluded with the adoption of a convention establishing such a court". J. Crawford, "Remarks" (1995) 89 *Proc. A.S.I.L.* 301, p.302 "the question has changed; it is no longer *if* we are going to have an international criminal tribunal, but what kind of criminal tribunal we will have".

## DIFFICULTY AND COST

It is obvious that trying cases of violations of international criminal law is not easy, particularly when the events are temporally or geographically distant. First, the number of practising lawyers with knowledge of international criminal law is very small, and this extends to the judiciary, who are not trained in such areas. As a result, trying these cases involves finding and engaging the services of trained personnel. This is not simple. Another difficulty in this area is the obtaining of evidence. For countries with no particular link to a conflict, or trying offences from a past conflict, problems of evidence gathering may be nearly insurmountable. Indeed evidential inadequacy has been the downfall of two recent trials, *D.P.P v Polyukhovic*<sup>40</sup> and *Dusko C.*<sup>41</sup> To find witnesses, arrange transport for them, to obtain forensic evidence from the scenes of crimes, take depositions from those unwilling to travel to the jurisdiction and to ensure that all collected evidence meets national admissibility standards takes much time and effort, and resources. The extent to which the tribunals overcome the problems in extradition and mutual legal assistance is dealt with in chapter 3.

Cost is another feature of States' reluctance to prosecute. Mounting such a prosecution requires considerable outlay, with no guarantee of result. In the case of Australia, the failure of the *Polyukhovic* prosecution led to the closure of the Australian War Crimes Bureau, it having attempted three prosecutions, failed in all three and cost A\$20m. The press picked up on this spending which turned opinion against more trials.<sup>42</sup> It is also notable that when the UK was passing the War Crimes Act 1991,<sup>43</sup> for the prosecution of World War II offences, concern was expressed in Parliament at costs

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<sup>40</sup> (1991) 101 ALR 545. See Triggs, *supra* n.11, p.132. On the extent of the cooperation between various States that was required for the Australian attempts at prosecution see Blewitt, *supra* n.11, p.322.

<sup>41</sup> Beschluss des Obersten Gerichtshofs Os 99/94-6, 13 July 1994.

<sup>42</sup> Triggs, *supra* n.11, p.123. See also D. Bevan, *A Case to Answer* (Kent Town, Australia: Wakefield Press, 1994) pp.22-23.

<sup>43</sup> 1991 ch. 13.



mentioned to be between £7 -£10m per prosecution.<sup>44</sup> States without direct interest in prosecution may see themselves as having higher priorities, or at least having a convenient pretext for inaction.

These examples, of course come from industrialised countries, where costs are not necessarily crippling, although they may be a political issue. In countries such as Rwanda and Ethiopia, trials are being undertaken in societies that are immensely poor, and are both involved in armed conflicts in an unstable part of the world. Ethiopia has also recently been the victim of a famine, and claims that the approach should be “food first, justice later” are difficult to refute. Therefore the cost of large or small scale prosecutions that comport with internationally recognised human rights may be beyond the purse of many small or underdeveloped countries. This is particularly the case for those that have recently been at war or the subject of mass atrocities. Wars and atrocities of this nature can destroy the economic life of a country, as Rwanda showed.<sup>45</sup>

The problems of obtaining the services of staff conversant in international criminal law that States have encountered are also applicable at the international level. Although there was not, and is not, a lack of people willing to work at the ICTY, at least in the beginning, many of those who went knew little about humanitarian law. This extended to the Prosecutor’s office<sup>46</sup> and the bench of both the ICTY and ICTR.<sup>47</sup> Of course, the more people who work at the UN Tribunals, as officials or interns, the larger body of persons there will be to work in the ICC or in national prosecutions. With the rehabilitation of international criminal law as an academic discipline, more universities, governments and NGOs are running courses on international criminal law, which

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<sup>44</sup> *Hansard* 18. March 1991, HC Deb. 188 col. 116.

<sup>45</sup> See, e.g. G. Prunier, *The Rwanda Crisis: History of a Genocide* (London: Hurst & Co, 1997) pp.327-328.

<sup>46</sup> M. Schrag, “The Yugoslav War Crimes Tribunal: A Prosecutor’s View” (1995) 6 *Duke J.I. & C.L.* 187, p.187 reports that she, and many of her colleagues at the OTP, upon arrival knew little humanitarian law. The Deputy Prosecutor, Graham Blewitt, came from the Australian war crimes unit, and was one of the few ICTY prosecutors with experience of prosecution of war crimes. This is not in any way intended to question the dedication or professionalism of any of the staff, merely to note that the supply of those with direct experience of prosecution of international crimes was low. Those with the most direct experience, those who prosecuted after WWII were, of course, too old by 1993 to work actively as prosecutors, although some, such as Ben Ferencz have maintained an active interest in advocacy of an international criminal court.

<sup>47</sup> Alvarez, *supra* n.4, p.420.

expands the body of people informed on the law.<sup>48</sup> The only way out of shortages of trained staff is learning, training and experience. We may be seeing the beginnings of a body of professional international criminal investigators, prosecutors and judges, which, in the long run could provide the answer to the dearth of trained international criminal lawyers.

Until the Rome Statute, each tribunal (with the partial exception of the ICTR) has had to be created as a structure from nothing, so international criminal tribunals have been expensive. Between 1993 and 2000 the official budget of the ICTY totalled over US\$380million. Since its creation, the ICTR has cost in the region of US\$310m, a sum that some have suggested would have been better spent reconstructing the Rwandan judicial system.<sup>49</sup> As a counterweight to these considerations, the relative burden on each State is less than if it were unilaterally to attempt prosecutions. Also, as funding comes from the UN coffers, the proportion of the cost borne by each State is based on their ability to pay.<sup>50</sup> A problematic concomitant to this set of arrangements is that larger States, as larger contributors to funds, may be able to put pressure on these courts.<sup>51</sup> Both of the UN Tribunals have also been heavily dependent on donations given by States, either in the form of monetary grants or seconded personnel.<sup>52</sup> Such gifts could raise issues of partiality, as the exchanges concerning the possible investigation of NATO

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<sup>48</sup> One such initiative is the UK government's torture handbook C. Gifford, *The Torture Reporting Handbook* (Colchester: University of Essex Human Rights Centre, 2000). Richard Goldstone, "Assessing the Work of the United Nations War Crimes Tribunals" (1997) 33 *Stanford J.I.L.* 1, p.6 "you would not be sitting at Stanford Law School listening to a talk about war crimes if the international community had not set up the tribunals for former Yugoslavia and Rwanda". In response to requests from participants, the *Course on International Law for Military Lawyers* run through the University of Nottingham has recently increased its component on international criminal law, the ICC and the experiences of the international courts.

<sup>49</sup> Alvarez, *supra* n.4, pp.414.

<sup>50</sup> The percentage of the UN's budget which is paid by each State is assessed on a scale reflecting ability to pay, see B. Simma (ed.), *The Charter of the United Nations: A Commentary* (Oxford: OUP, 1994) pp.309-311.

<sup>51</sup> This is by no means new, or limited to the UN Tribunals, one of the reasons that the US was willing to pay for the Tokyo IMT pending an agreement among the Allies and Japan on where the cost should finally lie, was that by holding the purse strings, the US was able to influence the track the IMT took. See Pritchard, *supra* n.20, p.125-126.

<sup>52</sup> See *1<sup>st</sup> Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law on the Territory of Former Yugoslavia From 1<sup>st</sup> January 1991*, UN Doc. A/49/342, para 183-188; *2<sup>nd</sup> Annual Report*, UN Doc. A/50/365 paras. 140-151; *3<sup>rd</sup> Annual Report*, UN Doc.A/51/292, paras 181-198. UN Doc. A/RES/51/292 demanded that reliance on seconded personnel be ended by the end of 1998.



actions in Kosovo have shown.<sup>53</sup> Underfunding has also proven problematic for not only the tribunals, but the investigatory bodies which preceded them.<sup>54</sup> These quandries may not be easily soluble, as even where an obligation to pay is clear, as in the UN, actually collecting that money is difficult.

The cost of the *ad hoc* tribunals may have been part of the impetus for the creation of the Rome Statute,<sup>55</sup> but the ICC will not come cheap. As Clark has mentioned, “the Prosecutorial office... if it is meant to be a serious professional operation, is likely to be very expensive”.<sup>56</sup> Thus financing is of fundamental importance for the ICC, and was one of the difficult issues at the Rome Conference.<sup>57</sup> The situation is complicated as the Court will not necessarily have control over the number of cases, which makes forward planning difficult.<sup>58</sup> The Court’s budget will be set by the Assembly of States Parties,<sup>59</sup> who may, should the whim take them set the budget low or high. The dangers of the former are that the Court could be prevented from taking an active role in prosecution by lack of finance, as happened to the two UN Tribunals. This is not too far-fetched, particularly if the Court is brought into being by the ratifications of 60 small or impecunious States and the UN refuses, or limits, any funding.<sup>60</sup> Setting the budget at a level that cannot be realistically afforded will do nothing more than raise hopes, and the possibility of

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<sup>53</sup> When Prosecutor Arbour asserted that the ICTY had jurisdiction over the NATO actions in Kosovo, NATO spokesman Jamie Shea responded that he did not think indictments were likely, and “NATO countries are those that have provided the finances to set up the Tribunal” (1999) 125 *Tribunal Update*. Alvarez, *supra* n.4, p.398 queries the extent to which the UN Tribunals can be independent of their “*de facto* master and treasurer” the Security Council, to which could be added the General Assembly, which controls their budgets.

<sup>54</sup> See, *supra* p.37.

<sup>55</sup> Scheffer claims that one of the reasons that a permanent court is required is that it is too expensive to reinvent the wheel (an *ad hoc* court), every time offences are to be prosecuted, D.J. Scheffer, “International Judicial Intervention” (1996) 102 *Foreign Policy* 34, p.49. Michael Scharf is of the opinion that one of the underlying causes of “tribunal fatigue” is the cost, M.P. Scharf, “The Politics of Establishing an International Criminal Court” (1995) 6 *Duke J.C. & I.L.* 167, p.170.

<sup>56</sup> R.S. Clark, “The Proposed ICC: Its Establishment and Its Relationship with the UN” (1997) 8 *Crim. L.F.* 411 p.413. See also Amnesty International, *The International Criminal Court: Making the Right Choices: Part IV. Establishing and Financing the Court and Final Clauses* March 1988, AI Index No. 40/04/98; J. Laurenti, *Considerations on the Financing of an International Criminal Court*, (Rome: UN Association of the US, 1998). For a review of the negotiations on financing see S. Rama Rao, “Financing of the Court, Assembly of States Parties and the Preparatory Commission” in Lee, *supra* n.36, 399, pp.399-406.

<sup>57</sup> S. Rama Rao, “Article 113” in Triffterer (ed.), *supra* n.31, 1215, pp.1215-1216.

<sup>58</sup> M. Halff & D. Tolbert, “Article 115” in Triffterer (ed.), *ibid.*, 1221, pp.1224-5.

<sup>59</sup> Article 115, see *ibid.* p.1225.

<sup>60</sup> Under Article 115 the UN is permitted to pay into Court funds “in particular” for Security Council referrals. The UN is under no legal duty to do so, and if the Court remains far from universal, it may consider itself to be under no moral duty to do so either, see Halff & Tolbert, *ibid.* pp.1223, 1227-8.

bankruptcy as States will not be able to pay.<sup>61</sup> There is another method of funding for the Court, that of voluntary contributions, but these cannot be relied on heavily as they are discretionary, thus unforeseeable, and they cause suspicions of influence being bought.<sup>62</sup>

Despite these difficulties, the cup should be seen as half-full, rather than half-empty. The cost of investigation is going to be spread at least 60 ways, rather than States having to shoulder the entire cost of prosecutions themselves. If the court achieves its goal of promoting efficient prosecution in national jurisdictions, the cost will again fall on States. However the expense which has characterised previous attempts will be mitigated by economies of scale and timely prosecution of offences.<sup>63</sup> If the national prosecution of such crimes becomes inculcated into national criminal tradition, then costs will be more easily integrated into the normal law enforcement budget of a State, rather than being seen as additional expenditure. It is also possible (but as yet speculative) that a State finding itself unable to bear the cost of prosecution could either ask the court to declare it “unable to genuinely carry out the investigation or prosecution” in the sense of Article 17, or waive its rights under that Article. This would pass the authority to investigate and prosecute (and the related costs) to the Court, (or other States who wished to prosecute the accused), leaving the impecunious State only to contribute its share under Article 117 if the Court handles the proceedings.<sup>64</sup> How much the Court will be willing for this to happen may be determined by how well financed the Court is itself. If its budget is stretched, then it will be vigilant about States seeking to externalise their prosecution costs without a clear necessity.

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<sup>61</sup> Amnesty International also point out that it could deter lesser developed countries from joining the Statute, and point to the failed attempts to fund the Committee Against Torture by State parties' contributions to argue (pre-Rome) against this form of funding. Amnesty International, *supra* n.56, Ch.II. D. 1.

<sup>62</sup> On Article 116, which allows the Court to accept voluntary contributions see M. Halff & D. Tolbert, “Article 116” in Triffterer (ed.), *supra* n.31, 1229, especially p.1231 on influence.

<sup>63</sup> Part of the reason for the expense has been that offences prosecuted recently have primarily been based on WWII, thus requiring difficult investigation, which need not be the case in prosecution of offences in a timely fashion, in the *forum conveniens*.

<sup>64</sup> Under Article 117, contributions are to be worked out on a scale along the lines (*mutatis mutandis*) of that used by the UN, i.e. based on ability to pay. See M. Halff & D. Tolbert “Article 117” in Triffterer, *supra* n.31, p.1233.



## POLITICAL HURDLES

### INTERFERENCE

A priority States have is the maintenance of friendly international relations. The realities of the situation are simple, prosecuting individuals from a foreign state is likely to be seen as an unfriendly act even if it is for an international crime. This is particularly so for such crimes as genocide or crimes against humanity, which generally have state consent or acquiescence.<sup>65</sup> As a result, it is highly unlikely that nationals of a friendly State suspected of international crimes will be tried in another State, unless they are insurgents against that State. Paradoxically, those of unfriendly States with at least one powerful ally are unlikely to be prosecuted for fear of upsetting that ally. Whilst this is troublesome enough in international conflicts, when the conflict is internal then the State concerned is highly likely to be taken to be interfering in internal affairs, or taking sides, which States are usually loath to do. As Bothe comments: “a neutral state will most often try to stay away from the politically difficult undertaking to punish another state’s officials”.<sup>66</sup> The political furore around the Pinochet litigation (1998-2000) showed this remains the case.<sup>67</sup> It is no coincidence that for prosecutions under the UK Geneva Conventions Act 1957 or the Genocide Act 1969 the consent of the Attorney-General is required before a prosecution can be undertaken, or the prosecution must be taken by the Director of Public Prosecutions.<sup>68</sup> Also, in the 1994 *Code for Crown Prosecutors* when a determination is required of whether a prosecution is in the public interest, one of the factors Crown Prosecutors are to consider is if any disclosures in the trial could harm international

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<sup>65</sup> It is ironic that although in legal terms, State immunity does not attach to international crimes, States are still, *de facto* highly sensitive to any allegations of international crimes directed at them or their nationals.

<sup>66</sup> Bothe, *supra* n.30, p.584.

<sup>67</sup> This was clearly a factor in Lord Lloyd’s dissent in the first House of Lords judgment on Pinochet: “[f]or an English court to investigate and pronounce on the validity of the amnesty in Chile would be to assert jurisdiction over the internal affairs of that State”, *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* [1998] 4 All ER 897, pp.934-935. Chile intervened in the 3<sup>rd</sup> Pinochet appeal. There were concerns that the extradition proceedings would damage relations with Chile, with whom the UK has important trading links, see M. Byers, “The Law and Politics of the *Pinochet* Case” (2000) 10 *Duke J.C. & I.L.* 415, p.421 The UK also came under pressure from the US to allow general Pinochet back to Chile *ibid.* p.431. The Vatican also exerted pressure to this effect, G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Harmondsworth: Penguin, 1999) p.349.

relations.<sup>69</sup> It would not be excessive to extrapolate from this that if the prosecution itself might jeopardise international relations, prosecutors could consider a prosecution not to be in the “public interest”. This is particularly the case when the alleged offender comes from a friendly State. General Pinochet was quick to criticise the UK for its part in his arrest, partially on the grounds that Chile was a friendly State, and had helped the UK during the Falklands conflict.<sup>70</sup>

There is, however, an interesting phenomenon surrounding conflicts which have received the attention of an international criminal tribunal. Before the 1990s, almost all the prosecutions of international crimes committed by non-nationals of the prosecuting State were of those associated with the European sphere of WWII.<sup>71</sup> There are various reasons for this, including that there was no State openly willing to protect the Nazis. The State of nationality of many (although not all) defendants was Germany, which was itself prosecuting Nazi offences and was therefore unlikely to protest other States’ efforts at prosecution. Another reason that this culture of prosecution arose around Nazi offences was the Nuremberg IMT delegitimising that regime, and creating a precedent for prosecution of its officials.<sup>72</sup> The influence of the Nuremberg Charter and judgment can be traced in certain of the national laws on prosecution of WWII offences,<sup>73</sup> evidencing that those prosecutions are inspired, and legitimised, by the Charter and judgment.

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<sup>68</sup> Geneva Conventions Act 1957, s1(3), Genocide Act 1969 (1969) ch. 12, s1(3). The same is true of prosecutions under the War Crimes Act 1991, s1(3).

<sup>69</sup> *Code for Crown Prosecutors* (1994) s.6.5.

<sup>70</sup> BBC News “General Pinochet’s Statement in Full” 8 November 1998 available at <<http://news6.thdo.bbc.co.uk/hi/english/uk/newsid%F209000/209742.stm>>. “The friendship between our countries is, of course an historic one... that friendship has stood the test of time. When Argentine forces occupied the Falklands in 1982 I instructed my government to provide, within the context of our neutrality, whatever assistance we could to our friend and ally... I am saddened that the experience of my arrest has shaken my belief in Britain”. Byers suggests though that although pro-Pinochetist support in Chile meant that the government felt compelled to uphold a public face of upset at the Pinochet arrest, in private they were pleased that he was removed from the scene in the election period, Byers, *supra* n.67, 439.

<sup>71</sup> See *infra*, pp.316-317.

<sup>72</sup> This is alluded to, without discussion, in J. Charney, “Progress in International Criminal Law?” (1999) 93 *A.J.I.L.* 452, p.456.

<sup>73</sup> For example Denmark, Belgium, Greece, Poland, China, Israel all have legislation based on the IMT Charter and judgment. See I Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon, 1963) pp.176-181.



In contrast, with respect to the Far Eastern sphere of WWII, there were no trials after the initial post war prosecutions by the belligerents.<sup>74</sup> Possible explanations of this is the general perception of illegitimacy that surrounded the Tokyo IMT, and its relatively low profile. Another reason could be that there was less of an exodus of alleged war criminals from Japan than there was of the alleged Nazi criminals from Germany. There was also no clean break of regime between the pre and post-war Japanese governments,<sup>75</sup> such that there could be seen to be a government who may have protested the prosecution of alleged Japanese crimes in WWII.<sup>76</sup>

Proof that the prosecution of offenders from a conflict by an international criminal tribunal serves to help States overcome the “interference” argument can be gleaned from the experience of the two UN Tribunals. Since their creation there has been a marked increase in the number of prosecutions of international crimes alleged against non-nationals in national courts.<sup>77</sup> The important thing to be noticed is that almost all of these prosecutions not only post-date the creation of the UN Tribunals, but also relate almost entirely to either Former Yugoslav or Rwandan defendants.<sup>78</sup>

These prosecutions are particularly significant. Unlike those relating to the Nazi defendants, prosecutions here have been initiated by States that have no direct link to the

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<sup>74</sup> J. Crawford, “An International Criminal Court?” (1997) 12 *Connecticut J.I.L.* 255, p.256. On the prosecutions in the direct aftermath of the war see, for example, G. Erickson, “US Navy War Crimes Trials (1945-1949)” (1965-66) 5 *Washburn L.J.* 89; J. Ginn, *Sugamo Prison, Tokyo: An Account of the Trial and Sentencing of Japanese War Criminals in 1948, by a US Participant* (Jefferson: North Carolina, 1992); Piccigallo, *supra* n.20; Pritchard, *supra* n.20, pp.134-140.

<sup>75</sup> The most potent reminder of this, of course was the continuity in the position of Emperor Hirohito.

<sup>76</sup> The attitudes of post-war Japan to those convicted at the Tokyo IMT was, at the least, sympathetic, for example, Tojo, the major defendant at the Tokyo IMT was reburied in 1977 in a Tokyo Shinto shrine in 1977. See A. Brackman, *supra* n p.27. The famous apology given in 1995 by Prime Minister Murayama, had to be given in an individual, as opposed to official capacity, due to political pressure in Japan, see Tanaka, *supra* n.20, p.8.

<sup>77</sup> The recent upturn is noted by e.g. A. Bianchi, “Immunity Versus Human Rights: The Pinochet Case” (1999) 10 *E.J.I.L.* 237, p.253, although he does not attribute it to the UN Tribunals’ influence.

<sup>78</sup> This has not escaped the attentions of some scholars, see for example, Charney, *supra* n.72, p.456; T. Meron, “War Crimes Law Comes of Age” (1998) 92 *A.J.I.L.* 462, p.464; A. Cassese, “On the Current Trend Towards Criminal Prosecution and Punishment of Breaches of International Criminal Law” (1998) 9 *E.J.I.L.* 2, p.6 “following the establishment of the International Criminal Tribunal for former Yugoslavia, and plausibly as a result of the incentive created by that initiative” national prosecutions have occurred. The “synergy” advocated by Meron has been questioned by Alvarez, *supra* n.4, p.369, yet even he is prepared to admit (p.421-22) “it is doubtful whether a number of recent civil and criminal cases before national courts would have been brought but for the establishment of these two *ad hoc* tribunals”. The cases to which this section refers are discussed in chapter 3, p.97.

conflict themselves.<sup>79</sup> The existence of an international criminal tribunal serves to prove the international interest in the prosecution of such offences, and demonstrate that they are not purely within the domestic jurisdiction of States. Nevertheless, the creation of such tribunals may not be determinative. In both the Yugoslav and Rwandan cases, there is no powerful State willing to protest on behalf of the defendants.<sup>80</sup> It could be argued that this, instead of the existence of international criminal tribunals, dictates who is prosecuted and who is not. This contention does not withstand scrutiny, because there are a huge number of other defeated regimes with no powerful supporters where there have been no prosecutions in neutral States (the Mengistu regime being a prime example). Still, this must be taken into account, so the existence of an international criminal tribunal is a relevant and persuasive factor encouraging prosecution, but not a sufficient cause of national prosecutions *per se*.

Further support for the idea that prosecution breeds prosecution, although this time at the international level can be obtained from the previous experience of international criminal tribunals. *Ad hoc* tribunals have come about in pairs. One of the reasons for the inclusion of war crimes in the jurisdiction of the Tokyo IMT was the existence of the Nuremberg IMT.<sup>81</sup> Initially, the US only wanted to prosecute the attack on Pearl Harbour. Because of the more wide ranging trials set up in Nuremberg, if that was done, the implication would have been that there were no war crimes or crimes against humanity committed in the Pacific sphere, and aggression had only been committed

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<sup>79</sup> Previous prosecutions of Nazi defendants in the post-war era have all been by States either actually involved in the war, or (in the case of Israel, which was not in existence during WWII) whose nationals were the victims of the offences.

<sup>80</sup> In the Rwandan case, this is unsurprising, as the Rwandan government itself is prosecuting the offences too. In the former Yugoslav case, all the States have held trials of alleged war criminals and are hardly in a position to be critical, not least as Serbia is currently a pariah State, and Bosnia is still dependent on international involvement. As, because of the creation of the ICTY, the international community has shown itself to be in favour of prosecution, it makes it less likely that there would be protests. As far as research has shown, there has been no public protest by Serbia of the national prosecution of Serbs (from Serbia or Bosnia).

<sup>81</sup> See Röling, *supra* n.20, pp.593-598. Especially p.596 "the Tokyo trial was a natural and unavoidable consequence of the Nuremberg trial".



against the US.<sup>82</sup> This was unacceptable to the Allies, and to rectify the situation the Tokyo IMT was granted a wider jurisdiction than its primary advocate originally intended.

The existence of the two IMTs did not lead to a wide-ranging trend towards tribunals. The pull towards action was not strong enough to withstand powerful contrary political forces.<sup>83</sup> The UN Tribunals do show some additional support for the dynamic of punishing international crimes. After the Rwandan genocide, the most natural response seemed to be the construction of another *ad hoc* tribunal. When calling for the creation of a tribunal, the Rwandan government explicitly invoked the precedent of the previous international criminal tribunals, and asked “is it because we are Africans that a court has not been set up?”<sup>84</sup> This underscores an important point in international criminal law, the idea of a universal crime gives rise to expectations of universal enforcement. Even when the initial turn to the law is made for political reasons,<sup>85</sup> that turning to the law gives rise to an expectation that when similar events occur, the response will be the same.<sup>86</sup> This time, the existence of the two tribunals did have a further effect, that of spurring on the

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<sup>82</sup> *Ibid.*, pp.596-8.

<sup>83</sup> See J. Dugard, “Obstacles in the Way of an International Criminal Court” (1997) 56 *Cambridge L.J.* 329, p.329 states that the Nuremberg and Tokyo Trials did lead to an “enthusiasm” for a court, this did not survive the cold war. Still, when the Yugoslav conflict broke out, Nuremberg provided a clarion call, for example, M. Klarin, “Nuremberg Now!” (19<sup>th</sup> May 1991) *Borbu*, translation from the Serbo-Croat in A Cassese (ed.) *The Path to the Hague* (The Hague: ICTY, 1996) 13; J. O’Brien, “Comments” (1995) 12 *N.Y.L.S.J.H.R.* 657, p.657.

<sup>84</sup> Quoted in V. Morris & M.P. Scharf, *The International Criminal Tribunal for Rwanda* (N.Y: Transnational, 1998) p.62 See also P. Akhavan, “The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment” (1996) 90 *A.J.I.L.* 501, p.501 “On the basis of international responses to other situations, it has been suggested that the plight of African victims would not generate the same outcry as the suffering of Europeans. In other words, the Rwanda tribunal was set up because of the precedential effect of the Yugoslav tribunal” (also referenced in Morris & Scharf, *ibid.*); P. Akhavan, “Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda” (1997) 7 *Duke J.C. & I.L.* 325, p.328, “Had the Rwandan genocide occurred first, would we have resigned ourselves to the view of Africa as a continent where horror is commonplace, and where an International Tribunal would make no appreciable difference?”.

<sup>85</sup> As was the case for the creation of the ICTY, the Security Council certainly saw itself to be under no legal duty to act as it did.

<sup>86</sup> See E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (Harmondsworth: Penguin, 1990 (1975)) pp.262-263. See also B. Ferencz, “International Criminal Courts: The Legacy of Nuremberg” (1998) 10 *Pae I.L.R.* 203, p. 225, “temporary tribunals, created after the event, and with only limited jurisdiction to deal with a few particular crimes, only within a limited time frame, are better than doing nothing. But it is certainly not good enough. Law, to be worthy of the name, must apply equally to everyone, everywhere. What is needed now is a permanent international criminal court to condemn major crimes that threaten the peace and security of all human beings”.

negotiations for the ICC.<sup>87</sup> Part of the reason for that was the criticism of the UN tribunals on the ground of selectivity.

The last point leads onto another fundamental question. Have the tribunals managed to successfully show that international crimes, no matter where they are committed, are matters of international concern, and not a matter purely for the domestic jurisdiction of the *locus delicti*? In other words, have they vindicated the use of the law *per se* or just the prosecution of offences from certain conflicts? The Nuremberg and Tokyo IMTs did not lead to general prosecutions of international crimes,<sup>88</sup> although many unofficial bodies and writers appraised the conduct of States by reference to the “Nuremberg Principles”.<sup>89</sup> When it came to Yugoslavia, the existence of the Nuremberg IMT was seen as a reason to create a tribunal. There were few, if any analogous attempts to use the “Tokyo principles”, if any separate substantive body of law could be said to have arisen from them.<sup>90</sup>

A good case can be made that the UN Tribunals (especially the ICTY) have made a contribution to the vindication of attempts to prosecute international crimes. The

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<sup>87</sup> See Crawford, *supra* n.74, p.257; Bolton, *supra* n.33, p.62; Brownlie (1998), *supra* n.39.

<sup>88</sup> McCormack, *supra* n.38, pp.682-3, “the reality [is] that innumerable alleged violations of international law have gone unpunished, despite the expectations raised by the Nuremberg and Tokyo Tribunals”. His use of the Tokyo Tribunal here is interesting, very few others refer to the Tokyo IMT, and even here the reference is cumulative to that of Nuremberg.

<sup>89</sup> Probably the most famous of the academic attempts is Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle Books, 1970). See also W. Bosch, *Judgement on Nuremberg: American Attitudes Towards the Major German War Crimes Trials* (Durham: North Carolina U.P., 1970) p.187. W. Baird (ed.), *From Nuremberg to My Lai* (London: Heath & Co., 1972); W.V.O’ Brien, “The Nuremberg Principles” in Finn (ed.) *A Conflict of Loyalties*, reprinted in R. Falk (ed.), *The Vietnam War and International Law* (Princeton: Princeton U.P., 1972) 193; W.V. O’Brien “The Nuremberg Precedent and the Gulf War” (1991) 31 *V.J.I.L.* 391; L. Ocampo, “The Nuremberg Parallel in Argentina” (1990) 11 *N.Y.L.S.J.I. & C.L.* 357; B. Ferencz, “The Nuremberg Precedent and State Sponsored Mass Murder” (1990) 11 *N.Y.L.S.J.I. & C.L.* 325; L-R. Beres, “Toward Prosecution of Iraqi Crimes Under International Law: Jurisprudential Foundations and Jurisprudential Choices” (1991/2) 22 *Cal.W.I.L.J.* 127. Of the institutional attempts to use the “Nuremberg principles” the most famous is the Russell Tribunal on Vietnam, see R.A. Falk, “Keeping Nuremberg Alive” in R.A. Falk, F.V. Kratchowil & S.H. Mendlovitz (eds.), *Reconciling International Law* (Boulder: Westview, 1985) 494. In many ways, these works and bodies, although differing in their intent and conclusions, all try to live up to Justice Jackson’s declaration, “whilst this law is applied first against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment” *Trial of the Major War Criminals* (Nuremberg, 1947) Vol. 2, p.154.

<sup>90</sup> Perhaps the only full attempt to use the Tokyo IMT (not its law) for the purposes of evaluating activity is Minear, *supra* n.20; Other works referring to parts of the Tokyo judgment include J.J. Paust, “My Lai and Vietnam: Norms, Myths and Leader Responsibility” (1972) 57 *Military L.R.* 99 and W.H. Parks “Command Responsibility for War Crimes” (1973) 62 *Military L.R.* 1, but both of these refer to the Tokyo judgment in addition to a number of other sources of international law, and neither see themselves as applying the “spirit” of the Tokyo IMT, unlike those relating to Nuremberg. On the intellectual ferment that is part of the



increase in national interest in international criminal law since their inception,<sup>91</sup> which has led to a number of States incorporating international criminal norms into their domestic law, can be attributed in part to their presence. Since the creation of the ICTY there has been an increase in attempts to prosecute international crimes either directly, or indirectly, related to the UN Tribunals. Judge Garzon, the Spanish judge responsible for the extradition request for General Pinochet expressed a debt towards the ICTY.<sup>92</sup> More recently, the Senegalese attempts to prosecute the ex-Chadian Head of State appear to have adopted the Pinochet litigation as an inspiration,<sup>93</sup> thus is at least indirectly traceable to the ICTY.<sup>94</sup> The existence and prosecutions of the UN Tribunals have not completed this process of justifying action. In Webber's words, no recent case "has aroused as much passion and partisanship" as Pinochet's.<sup>95</sup> The application of international criminal law outside the conflicts where there has been an international criminal tribunal remains politically controversial.<sup>96</sup> Nonetheless, the reviving of proposals, leading to agreement in 2000, for trial of the Khmer Rouge<sup>97</sup> against many expectations,<sup>98</sup> show a strong case for the argument that the impact of international criminal tribunals on the reincarnation of international criminal law has been important. As do the calls from Sierra Leone for an

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"Nuremberg Legacy", see M.C. Bassiouni, "The Nuremberg Legacy" in Bassiouni, *supra* n.10, 195, pp.211-212.

<sup>91</sup> In the words of Alvarez, *supra* n.4, p.421 "the establishment and operation of the ad hoc tribunals has significantly expanded the attention paid to international humanitarian law, not merely among international lawyers but among national and international policymakers".

<sup>92</sup> Alvarez, *ibid.*, p.421.

<sup>93</sup> See "An African Pinochet" *N.Y. Times*, 11.2.2000, p. A30. Although one court has dismissed the case (July 2000), this decision is now on appeal, and the point is still made that cases are now being brought that were unthinkable a decade ago.

<sup>94</sup> It may also not be coincidental that the ex-President of the ICTR, Laity Kama, is Senegalese, making the action traceable to that institution too, although this is speculative. On the indictment generally see F.L. Kirgis, "The Indictment in Senegal of the Former Chad Head of State" (February 2000) 41 *A.S.I.L Insights* pp.1-2 (<<http://www.asil.org/insigh41.htm>>).

<sup>95</sup> F. Webber, "The Pinochet Case: The Struggle for the Realization of Human Rights" (1999) 26 *J.L. & Society* 523, p.523. See Also Charney, *supra* n.72, p457, who notes the political bodies in the UK and Spain were uncomfortable about the litigation. What he omits to mention, though, is the sea change which allowed it to go ahead at all.

<sup>96</sup> Still, one of the large contributions of the ICTY, and, (perhaps to a greater extent) the ICTR is the legitimisation of international interest in offences committed in non-international conflicts, by their characterisation as threats to the peace, thus not purely domestic matters.

<sup>97</sup> UN Press release SG/SM/7481, although the deal is not fully settled yet, see BBC News "Khmer Rouge Genocide Deal" 6 July 2000, <[http://news.bbc.co.uk/hi/english/world/a-pacific/newsid\\_822000/822627](http://news.bbc.co.uk/hi/english/world/a-pacific/newsid_822000/822627)>.

<sup>98</sup> For comments prior to the deal see. D. Chandler, "Will There be a Trial for the Khmer Rouge?" (2000) 14 *Ethics and L.Aff.* 67; B. Rajagopal, "The Pragmatics of Punishing the Khmer Rouge" (1998) 1 *Y.B.I.H.L.* 189; S. Marks, "Forgetting the 'Policies and Practices of the Past': Impunity in Cambodia" (1994) 18 *Fl.F.Wld.Aff.* 17. On the Cambodia Settlement Agreements, which seemed to provide an amnesty in Article 15, see S.R. Ratner, "The Cambodia Settlement Agreements" (1993) 87 *A.J.I.L.* 1, especially p.4.

international tribunal for the prosecution of the rebels in Sierra Leone, which have not fallen on deaf ears in the Security Council.<sup>99</sup>

There is reason to believe that the Rome Statute and Court have, and could, have the effect of further entrenching the acceptability of domestic prosecutions of international crimes. This has been alluded to by several scholars, both before and after the Rome conference.<sup>100</sup> If the Rome Statute has this effect, it will not have been unintentional. Aspects of the preamble manifest the intention of the drafters to entrench the position of international criminal law.<sup>101</sup> The first of the preambular paragraphs with this theme is paragraph 3, which builds upon the Security Council practice determining violations of international criminal law to be threats to peace, by “recognizing that such grave crimes threaten the peace, security and well being of the world”. This, in itself vindicates action, as it brings such activities under the purview of Chapter VII of the UN Charter, thus outside the domestic jurisdiction of any State.<sup>102</sup>

This is not undermined by preambular paragraph 8, which provides “[e]mphasizing in this connection that nothing in this Statute shall be taken as authorizing any State party to intervene in an armed conflict or the internal affairs of any State”. The paragraph prior to 8 provides the context in which it operates (hence “emphasizing in this connection”). Paragraph 7 reaffirms “the Purposes and principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent

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<sup>99</sup> See C. Lynch “Sierra Leone Seeks Aid on Tribunal” 16 June 2000, *Washington Post* p.A24; BBC News, “Sierra Leone Backs Tribunal Plans” 28 July 2000 <[http://news.bbc.co.uk/1/hi/english/world/africa/newsid\\_855000/855478.stm](http://news.bbc.co.uk/1/hi/english/world/africa/newsid_855000/855478.stm)>.

<sup>100</sup> L.F. Damrosch, “Enforcing International Law Through Non Forcible Means” (1997) VII 269 *R.d.C.* 9, pp.239-241. Especially p.241, arguing that the ICC may only be symbolic, but “even ‘mere symbolism’ can have powerful real world effects, at least in the long run”. For a view post-Rome see Charney, *supra* n.72, p.452, stating that, with respect to the creation of the ICTY, ICTR and ICC, “each of these events appears to reflect growing support by the international community for the effective enforcement of international law”, and p. 464, arguing that the existence of the ICC will improve the legitimacy of international criminal law. Also in a telling editorial, the editors of the *American Journal of International Law* have said “we may well be witnessing the emergence of consensus in the international community that it accepts the responsibility to prosecute and punish, be it through international or domestic tribunals, persons who commit such crimes”; The Editors, “Developments in International Criminal Law” (1999) 93 *A.J.I.L.* 1, p.1.

<sup>101</sup> On the preamble generally, see O. Triffterer, “Preamble” in Triffterer, *supra* n.31, 1, especially at p.5, where he reminds us, “the *moral* and *political* importance of the adopted preamble should not be overlooked”.



with the Purposes of the United Nations”. Paragraph 8 is referring to forcible, or threatened forcible, intervention, not prosecution.<sup>103</sup>

Decisively, paragraph 9 states: “[d]etermined to these ends and for the sake of present and future generations, to establish an independent International Criminal Court... with jurisdiction over the most serious crimes of concern to the international community as a whole”. What this means is that, those crimes under the jurisdiction of the court must be regarded as being not purely an “internal affair of any State”. As international concern is justified by the Rome Statute (and by the Security Council’s action in setting up the two UN Tribunals), then at least between parties to the Rome Statute, there is a defence against the “interference” argument. This is only enhanced by the fact that the ICC is complementary to national jurisdictions, i.e. national enforcement is the preferred level of action.<sup>104</sup> This is particularly momentous in relation to crimes occurring in internal armed conflicts, or crimes against humanity or genocide occurring in peacetime.<sup>105</sup> The Rome Statute promotes the vindication of international interest in crimes occurring outside international armed conflicts that began, at the latest, with the creation of the ICTY and ICTR. There is some evidence that at least some of the States who have signed or ratified the Rome Statute are taking international criminal law very seriously indeed now. The first ratifying country, Senegal, has recently arrested Habre, the ex-head of State of Chad, on charges of murder, torture and disappearances, after allowing him to live in Senegal unmolested for a decade.<sup>106</sup> Whether or not the ICC will

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<sup>102</sup> See article 2(7) UN Charter.

<sup>103</sup> The impact upon this for the law relating to humanitarian intervention is, alas, beyond the scope of this thesis.

<sup>104</sup> See preambular paragraphs 4 & 10. A subsidiary argument can be based on paragraph 6, which recalls that States have a duty to prosecute international crimes. The question which remained unanswered at Rome was whether or not this meant on the basis of universal or territorial/nationality jurisdiction (see Triffterer, *supra* n.101, pp.12-13). Equally, the bone of contention there was whether or not there was a duty to prosecute, not a right.

<sup>105</sup> See Triffterer, *supra* n.101, pp.14-15.

<sup>106</sup> See “Africa’s Many Pinochets-in-waiting” 12.2.2000 *The Economist* (US Edition). As its title suggests, in addition to mentioning the Senegalese ratification of the Rome Statute, the article draws parallels with the Pinochet litigation. It must also be noted that it is not the argument of this section that international criminal tribunals are the sole cause of prosecutions and a groundswell of support for international criminal law. For another view affirming that it is possible that Senegalese ratification of the Rome Statute could have influenced the decision to proceed see R. Wedgwood, “International Law and Augusto Pinochet” (2000) 40 *V.J.I.L.* 829, p.846. International criminal tribunals remain, it is submitted, both symptom and cause of such support. After all, the creation of the Nuremberg IMT and (to a far lesser extent) the ICTY cannot be put

lead to an abandonment of the “interference” argument is currently unquantifiable,<sup>107</sup> but both recent history and the text of the Rome Statute itself give reason for hope.<sup>108</sup>

### *TU QUOQUE* (OR “CLEAN HANDS”)

The last part of international *realpolitik* relates to the cleanliness of the hands of those prosecuting. Many States have, at some point or another, been involved in acts that may fall foul of international law. Examples of such activities include the Vichy regime in France, as well as France’s record in Algeria, the US in Vietnam, and Europe’s record of colonialism. It is safe to say that most States view reminders of these events as embarrassing. It has thus come to pass that for a large proportion of States, a position of benign antipathy has been a way of avoiding charges of hypocrisy and having their own misdemeanours brought to international attention. An example of a very public assertion of this type of argument was the controversial defence of Klaus Barbie by Jaque Verges, whose strategy involved trying to undermine the prosecution of his client by raising questions about France’s role in Indochina.<sup>109</sup> When General Pinochet issued his first statement after being arrested at the behest of Spain, he took little time to remind the Spanish of their own activities, and response to them, under the Franco regime.<sup>110</sup> A form of reciprocal myopia towards offences has become endemic and has seriously damaged the enforcement of international criminal law in third party States. It is ironic that in this

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down, in any real way to any previous tribunals. The argument of this section is merely that international criminal tribunals are a contributory factor. For an argument that the UN tribunals were at least partially a response to a pre-existing increase in interest in humanitarian law see A. Roberts, “The Role of Humanitarian Issues in International Politics in the 1990s” (1999) 333 *I.R.R.C.* 19.

<sup>107</sup> The arrest of Habre, it would appear from the reports, has led to protestation from Chad, See the *Economist*, *ibid*.

<sup>108</sup> It must be remembered that while litigation such as *Pinochet* and on the Habre case is now controversial, a decade ago, it was all but unthinkable, much like the creation of a permanent international criminal court.

<sup>109</sup> Verges’ strategy is the subject of G. Binder, “Representing Nazism: Advocacy and Identity in the Trial of Klaus Barbie” (1989) 99 *Yale L.J.* 1321. His strategy drew strong condemnation from, for example Alain Finkielkraut, A. Finkielkraut (R. Lapidus trans.), *Remembering in Vain: The Klaus Barbie Trial and Crimes Against Humanity* (New York: Columbia U.P., 1992).

<sup>110</sup> See *supra* n.70, “in challenging Chile’s reconciliation, Spain ignores its own past. It denies to us the path which it followed. Spain left the Franco years with no recriminations”. He also referred to when “our own country obtained its freedom from Spanish colonial domination”.



area of law, where reciprocity is expressly denied as a basis for obligation,<sup>111</sup> it should reappear in practice, to avoid enforcement of that law.

The “clean hands” contention has been raised with respect to all the *ad hoc* international criminal tribunals, and some have argued, to prevent the creation of others. Both before and during the Nuremberg IMT’s proceedings the actions of their own States was on the minds of the prosecutors. At the London Conference, Justice Jackson made it clear that the prosecutors did not wish to be in a “position where the US is obliged to enter into a discussion at this trial of the acts or policies of our allies”.<sup>112</sup> The UK was concerned that the defendants would use the trial to grandstand their views, which would have included the Allies’ alleged misdeeds.<sup>113</sup> This had knock-on effects in the indictment process, as the bombing of population centres was deliberately omitted from the indictment, on the ground that any defence would involve raising the legality of similar allied bombings.<sup>114</sup> The legalised version of this allegation, *tu quoque*, has never been accepted.<sup>115</sup> It arose in a slightly different way in the Nuremberg IMT. Evidence of alleged Allied misconduct was generally forbidden by the Charter,<sup>116</sup> but Otto Kranzbühler, counsel for Admiral Dönitz, argued that allied practice in submarine warfare in the war was identical to that which was charged against his client.<sup>117</sup> He argued that the practice arose from the acceptance by both sides that customary international law accepted unrestricted submarine warfare. This position was partially adopted by the

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<sup>111</sup> 1969 Vienna Convention on the Law of Treaties 1155 UN.T.S. 331, Article 60. A. Cassese, “On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Criminal Law” (1998) 9 *E.J.I.L.* 2, p.5 also notes that the possibility of a State’s own misdeeds coming to light has retarded prosecution of offences committed by non nationals.

<sup>112</sup> R. Jackson, *Report of Robert H Jackson: US Representative to the International Conference on Military Trials* (Washington: US Government Printing Office, 1945) p.380.

<sup>113</sup> See Bassiouni, *supra* n.20, p.24. It is important to note that the UK raised this in the context of their arguments against any sort of trial whatsoever. There were serious questions, particularly about the activities of the Russians, both before, during, and after the war, that could embarrass the Allies. After all, Stalin had been involved in pogroms and the creation of the Gulags, activities analogous to those committed by the Nazis.

<sup>114</sup> See Röling, *supra* n.20, p.591, who also notes that the UNWCC omitted mention of such actions.

<sup>115</sup> For a recent reaffirmation of this see *Prosecutor v Kupresic, Kupresic, Kupresic, Josipovic, Papic & Santic*, Judgment, 14 January 2000, IT-95-16-T, paras 515-520.; M.C Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (NY: Transnational, 1996) pp.420-423.

<sup>116</sup> London Charter, Article 18(b).

<sup>117</sup> In support of this he submitted a signed statement by UN Admiral Chester Nimitz, which confirmed this allegation, see Luban, *supra* n.19, p.811; J. Shklar, *Legalism* (Cambridge: Harvard U.P. 1986) p.162; A.P. Rubin,

judgment.<sup>118</sup> Externally, the fact that the law was not applied to Allied actions has led many to criticise the Nuremberg IMT on that ground, and consider its integrity diminished as a result.<sup>119</sup>

In the Nuremberg IMT although the Allied record was not unsullied, no-one could claim moral equivalence between the sides. In Tokyo, the use of atomic bombs on Hiroshima and Nagasaki meant that some thought the two sides were equally guilty.<sup>120</sup> Allied activities arose in the judgments of the Tokyo IMT, particularly that of Mr. Justice Pal. Pal excoriated the Allied powers for what he saw as their hypocrisy,<sup>121</sup> on two grounds, their own record of colonialism, and the Hiroshima and Nagasaki bombings.

Pal criticised the US and its allies for trying to impose a prohibition of aggression that prioritised peace over the interests of those States under colonial domination.<sup>122</sup> He made a point of contrasting European and Japanese actions in the far-East, concluding that Japan was coerced into coming out of isolation “under terms of treaties obtained by the Western powers from her by methods which, when later on imitated by Japan in relation

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“The International Criminal Court: A Skeptical Analysis”, p.12 (forthcoming, pre-publication manuscript provided by A.P. Rubin).

<sup>118</sup> Nuremberg IMT Judgment, pp.303-305, for criticism, (on the ground that Dönitz was thus entitled to an acquittal) see T. Taylor, *The Anatomy of the Nuremberg Trials* (New York: Little Brown & Co., 1992) p.594. In another instance though, the UK Foreign Office deliberately withheld evidence relating to British plans to invade Norway, as it could have been embarrassing to them, See O. Kranzbühler, “Nuremberg as a Legal Problem” in W. Benton & G. Grimm (eds.), *Nuremberg: German Views of the War Trials* (Dallas: Southern U.P., 1955) 107, pp.115-116; A. Tusa & J. Tusa, *The Nuremberg Trial* (Macmillan: London, 1983) pp.261-263.

<sup>119</sup> J. Alvarez, “Nuremberg Revisited, the *Tadic* Case” (1996) 7 *E.J.I.L.* 245, p.260; M. Lippman, “Nuremberg Forty Five Years After” (1991) 7 *Connecticut J.I.L.* 1, pp. 37-38; G. Simpson, *supra* n.3, p.5. In addition see, A.P. Rubin “International Crime and Punishment” (Fall 1993) 34 *The National Interest* 73, p.73; M. Gordon, “Justice on Trial: The Efficacy of the International Criminal Tribunal for Rwanda” (1995) 1 *I.L.S.A. J.I & C.L.* 217, pp.226-227; A Roberts, “The Laws of War: Problems of Implementation in Contemporary Conflicts” (1995) 6 *Duke J.C. & I.L.* 11, p.26; K.R. Chaney, “Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials” (1995) 14 *Dickinson J.I.L.* 57, p.73; K. Acheson, “Nuremberg Sensibility” (1997) 7 *Harvard H.R.J.* cited in P. Akhavan, “Justice in the Hague, Peace in the Former Yugoslavia? A Commentary in the United Nations War Crimes Tribunal” (1998) 20 *H.R.Q.* 736, p.745. For an in depth discussion of the moral issues involved see M. Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick: Transaction, 1997) pp.122-135. This criticism is not limited to international lawyers, similar critiques have been made by international relations theorists and historians, see H. Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 2<sup>nd</sup> ed., 1995) pp.85-86; Tusa & Tusa, *ibid.*, p.415.

<sup>120</sup> Röling, *supra* n.20, p.591, “from World War II above all two things are remembered: the German gas chambers and the American Atomic bombings”.

<sup>121</sup> On this aspect of Pal’s dissent see generally, E. Kopelman, “Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial” (1991) 23 *N.Y.U.J.I.L. & Politics* 373.

<sup>122</sup> Dissenting Opinion from the Member From India, Judge Pal, in R.J. Pritchard & S.M. Zaide (eds.), *The Tokyo War Crimes Trial Vol.21: Separate Opinions* (New York: Garland, 1981) pp.238-241. In this respect, he also raised the USSR’s declaration of war on Japan, claiming it would fall under the definition of aggression proposed by the prosecution, *ibid.*, pp.241-246.



to her neighbours, were characterised by those very treaty powers as aggressive”,<sup>123</sup> and, “after the Russo-Japanese war, Japan seemed to follow closely the precedents set by Europe in its dealings with China”.<sup>124</sup> Pal reserved his most critical comments for the atomic bombings, which the prosecution had tried to ignore completely. He considered the Hiroshima and Nagasaki bombings far more iniquitous than anything the defendants were charged with: “[f]uture generations will judge this dire decision<sup>125</sup>... [to initiate the bombings]... if an indiscriminate destruction of civilian life and property is still illegitimate in warfare, then, in the Pacific war, this decision to use the atom bomb is the only near approach to the directives of the German emperor during the first world war and of the Nazi leaders during the second world war. Nothing like this could be traced to the credit of the accused”.<sup>126</sup> The actions of the prosecutors were publicly damned in Pal’s judgment, and those actions dominate discussion about the Pacific sphere of the war, to the exclusion of many of the acts prosecuted in Tokyo.<sup>127</sup> As with the Nuremberg IMT (albeit to a much greater degree) the activities of the prosecuting States served to partially undercut the legitimacy of the trial.<sup>128</sup>

Moving forward to the last decade, the same arguments have been made, perhaps successfully, by those seeking to prevent the creation of international tribunals, or to undercut their legitimacy. A conceivable explanation of the retreat of the coalition in the Gulf conflict of 1991 from their calls for an international tribunal for the Hussein government<sup>129</sup> was the allegations of coalition offences. These would either have to be brought before the tribunal or excluded from it, which would lead to allegations of

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<sup>123</sup> *Ibid.*, p.785.

<sup>124</sup> *Ibid.*, p.795(20) For his survey of pre-war activities see pp.795 (1-20), especially (rather at odds with this rejection of an objective definition of aggression) p.785(15) “European aggression on China”.

<sup>125</sup> It is very interesting that he described this decision as “coming from the allies” (*ibid.* p.1,091) rather than the US, when the position of the other allies on this is, at best controversial.

<sup>126</sup> *Ibid.* p.1,091, see Kopelman, *supra* n.121, pp.406-409. Kopelman, *ibid.* p.407 asserts that Pal described the bombings as a crime against humanity in this part of the judgment, he does not expressly say this, and appeared to be thinking of war crimes, but the point is still made. Judge Jaranilla also mentioned the bombings, coming to the conclusion that their use was entirely justified, relying on comments of US secretary of war Stimson, Concurring Opinion of The Member for the Philippines, *supra* n.122, pp.24-27.

<sup>127</sup> See Osiel, *supra* n.119, p.130.

<sup>128</sup> Judge Pal is the most notable example, but enunciation of this criticism was not limited to him by any means, see, for example, Röling, *supra* n.120.

<sup>129</sup> Some of these calls are reproduced in Cassese, *supra* n.83.

hypocrisy.<sup>130</sup> This is not to take a position on the acceptability or otherwise of the Allied actions, it is more to suggest that even the invocation of the possibility of their own actions being subject to external scrutiny was enough to raise concern amongst those with the power to set up such a tribunal.

The UN tribunals have been subjected to a variant of the claim. As the tribunals were not set up by one belligerent to judge the conduct of the other, but by the UN, arguments identical to those above could not be made. Critics have instead focused on the actions, or lack thereof, of the UN in the conflicts concerned. In addition contentions of this nature have been made about activities of permanent members of the Security Council.

Most of these critiques of the two UN Tribunals are cognate. They stem from popular impression that the “decision to set up an international tribunal was influenced by the political and moral pressure, both domestic and international, to do something.... because the international community was unable to agree on any major intervention or other decisive action, creation of a tribunal was one of the few options left”.<sup>131</sup> In other words the UN (or more specifically, the Security Council) could have prevented the international crimes in Yugoslavia and Rwanda, but there was not the political will to act forcibly to this end. Instead tribunals were set up as an alternative to the morally preferable option of those crimes’ prevention.<sup>132</sup> This implies that, in some way the UN, or its component member States, were at fault in failing to prevent the atrocities.<sup>133</sup> There have also been questions over the role of individual States. The ICTY,

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<sup>130</sup> D. Martin, “Reluctance to Prosecute War Crimes: Of Causes and Cures” (1994) 34 *V.J.I.L.* 255, p.259.

<sup>131</sup> Roberts, *supra* n.119, p.57.

<sup>132</sup> For arguments of this nature relating to the ICTY see C. Greenwood, “The International Tribunal for Yugoslavia” (1993) 69 *International Affairs* 641, p.643, J. Podgers, “The World Cries Out for Justice” (April 1996) *A.B.A.J.* 51, p.53; D. Forsythe, “International Criminal Courts: A Political View “ (1997) 15 *N.Q.H.R.* 5, p.8; D. Forsythe, “Politics and the ICTY” in R.S. Clark & M. Sann, *The Prosecution of International Crimes* (New Brunswick: Transaction, 1996) 185, p.187; V. Epps, “The International Trial of the Century? A Cross Fire Exchange on the First Case Before the Yugoslavia War Crimes Tribunal” (1996) 29 *Cornell I.L.J.* 636 p.637. For the ICTR, see, M. Morris, “The Trials of Concurrent Jurisdiction: The Case of Rwanda” (1997) 7 *Duke J.C. & I.L.* 349, p.357; C. Cissé, “The End of a Culture of Impunity in Rwanda?” (1998) 1 *Y.B.I.H.L.* 161, pp.162-3; M.M Wang, “The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact” (1995) 27 *Columbia H.R.L.R.* 177, pp.188-189; Alvarez, *supra* n.4, pp. 384, 390 & 411.

<sup>133</sup> The UN accepted this in relation to Rwanda see *supra* n.26.



in some eyes, is inextricably linked with the US,<sup>134</sup> who is one of its main sponsors and some have raised the issue of alleged US violations of law to undercut the legitimacy of the ICTY.<sup>135</sup> The refusal of the prosecutor to fully investigate NATO actions in Kosovo lends some support to these calls,<sup>136</sup> although they are frequently polemical and have often come from those who were already hostile to the ICTY.<sup>137</sup>

Proposed international prosecutions of the Khmer Rouge have led to the resurrection of accusations of complicity between the prosecuting authorities and the defendants. Ta Mok (who is to be tried for his activities as a Khmer Rouge leader) has hit back at the US, other countries and the UN, all of whom are pushing for international trials. Seeking to evade trial, he has claimed he will subpoena US and UK officials to answer questions about their actions, and past Secretaries-General of the UN to explain why the Khmer Rouge continued to be recognised at the UN in preference to the Vietnamese imposed government that ousted the Khmer Rouge.<sup>138</sup>

When the Rome Statute comes into force, the opportunities for this type of allegation to be made may diminish. The ICC is to be an independent body, with its own international personality.<sup>139</sup> Therefore it may be insulated from such claims, as it will pre-exist any actions over which it exercises jurisdiction. However, there is still the possibility for allegations of this nature. The Court is to be brought into a relationship with the UN

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<sup>134</sup> See, *inter alia*, A.Fatic, *Reconciliation via the War Crimes Tribunal* (Aldershot: Dartmouth, 2000) p.69; "The ICTY has demonstrated little or no divergence from the foreign policies of the great powers, especially the USA".

<sup>135</sup> See R. Dixon, *New Developments in the International Criminal Tribunal for the Former Yugoslavia* (1995) 8 *L.J.I.L.* 449, pp.460-462. Of course those raising these issues are frequently doing so in a self-serving manner, but that does not detract from the point that such arguments are being made to deter prosecutions.

<sup>136</sup> The Russian Foreign Ministry, for example issued a statement accusing the Tribunal of "political prejudice" in indictment after the prosecutor's refusal to fully investigate NATO, see (2000) 178 *Tribunal Update*.

<sup>137</sup> Predictably the FRY has been heavily critical of the ICTY for its refusal to investigate, viewing it as a demonstration of ICTY collusion with NATO. See for example its (highly propagandistic and personal) attack on ICTY Prosecutor Carla del Ponte, "Carla del Ponte's Legal Amateurishness and Dirty Political Game" 23 June 2000 <<http://www.serbia-info.com/news/2000-06/23/19609.html>>. This is nothing new. Commenting on the *Tadic* case, Alvarez maintained: "the official Serbian reaction has been that the *Tadic* proceedings and verdict constitute further evidence that the Tribunal is a fraud perpetrated by hostile foreign interests pursuing political show trials to undermine the Serbian nationalist cause" J. Alvarez, "Rush to Closure, Lessons of the *Tadic* Judgment" (1998) 96 *Mich. L.R.* 2031, p2053.

<sup>138</sup> BBC News, "Khmer Rouge Lawyer Targets World Leaders" 27.12.1999, <[http://news.bbc.co.uk/world/a-pacific/newsid\\_579000/579534.stm](http://news.bbc.co.uk/world/a-pacific/newsid_579000/579534.stm)>.

<sup>139</sup> Rome Statute, Article 4(1).

(Rome Statute Article 2). Depending on how close this relationship is, if the ICC becomes identified with the UN, then it could be open to some of the claims made against the two UN Tribunals. This will almost certainly be the case if the Security Council passes a situation to the ICC. Financing is also relevant, as the ICC could become considered dependent on, and thus an arm of, its major funders (as has the ICTY to some extent). If this comes to pass, there could be discussion surrounding the actions of those parties' actions. The final way the "clean hands" question could arise is if a State party refers a situation. A State may hold back from making such a referral for fear of being embarrassed itself either by retaliatory rhetoric, or even a referral of its own conduct to the ICC. Similarly to national trials, this argument, although it should not be thought to undercut the moral foundation of international (or national) criminal prosecution,<sup>140</sup> has quite consistently been made, and may have had a pernicious impact by causing some States to shy away from supporting such prosecutions. The ICC may be more insulated from these claims than the *ad hoc* Tribunals that have preceded it, but it may not be immune from them.

#### PROBLEMS OF ENFORCING INTERNATIONAL CRIMINAL LAW BY A STATE IN RELATION TO ITS OWN NATIONALS

Perhaps, to avoid the above mentioned problems, particularly those of obtaining witnesses and evidence in what still, for State prosecutions, is a bilateral regime of co-operation, it should be the State in which the offence occurred, or the State of nationality of the alleged offender who prosecutes the suspect. In international conflicts, unless the person is captured, offences are likely to be prosecuted, if at all, by the accused's home State.

Unfortunately, prosecution at home is also fraught with difficulty. One of the paramount problems facing prosecution is that most of the crimes are committed most

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<sup>140</sup> See Osiel, *supra* n.119.



frequently with State consent or acquiescence, the exception being usually when they are ordered or tolerated by an organised sub-State entity such as those in the Former Yugoslavia. As a result of this, the controls of the prosecution mechanisms in that State are often those of the perpetrators of the crimes themselves. This leads, almost without exception, to *de facto*, or *de jure* impunity.<sup>141</sup> In the Nazi state, even though there was understanding that the acts perpetrated amounted to crimes the idea of prosecution was, of course, completely alien. When criminality is State policy, the law of the State is a tool of that policy, not a check upon it.

Even when this Dystopia does not reflect reality, prosecution of nationals for serious offences is a difficult endeavour, as frequently there is not a majority of voters wishing to engage in an honest appraisal of their country's activities.<sup>142</sup> Jordan Paust puts the point eloquently: "those of us who are quick to judge sometimes ignore the fact that men are both good and bad whether they are of our nationality or that of the enemy".<sup>143</sup> Indeed, after 1971, US government legal experts decided not to prosecute any further US violations of humanitarian law as the issue was, politically speaking "too hot".<sup>144</sup> The introduction by the Rome Statute of a powerful national interest for prosecution "at home" for its States party could conceivably help counter this trend.

#### AMNESTIES<sup>145</sup>

Often, from a mixture of the above concerns, there are very powerful interest groups (be they in the government or the military) who are unwilling to countenance

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<sup>141</sup> Koffi Annan, in a speech to the Rome Conference (UN Doc. L/Rom/6.r1) expressed the point as follows "[g]radually the world has come to realise that relying on each State or army to punish its own transgressors is not enough. When crimes are committed on such a scale, we know that the State lacks either the power or the will to stop them. Too often, indeed, they are part of a systematic State policy, and the worst criminals may be found at the pinnacle of State power".

<sup>142</sup> M. Osiel, "Ever Again: Legal Remembrance of Administrative Massacre" (1995) 144 *U.Pa.L.R.* 463, pp.590-599. C van den Wyngaert, "War Crimes, Genocide and Crimes Against Humanity-Are States Taking Their Obligations Seriously?" in Bassiouni (ed.), *supra* n.10, 227, p.228 notes the lack of political will in prosecuting nationals.

<sup>143</sup> J.J. Paust, "My Lai and Vietnam: Norms, Myths and Leader Responsibility" (1972) 57 *Military L.R.* 99, p.101.

<sup>144</sup> *Ibid.* p.125.

<sup>145</sup> For further comments on amnesties, see, the Introduction, pp.6-7, and N. Roht-Arriaza, *Impunity In Human Rights Law and Practice* (Oxford: OUP, 1995).

prosecutions. Frequently, their claims are made in the context of attempts to obtain amnesties from prosecution, for themselves, or their political (or military) allies. Amnesties have been a particular feature of democratic transfers in Latin America, as old regimes have either granted themselves amnesties by passing legislation absolving themselves of responsibility or by forcing the hand of new regimes into passing legislation to this effect, or simply not prosecuting and displaying a quickly developed amnesia. Countries that have amnesties include Brazil, Guatemala, and Uruguay,<sup>146</sup> and Argentina.<sup>147</sup>

Argentina is an exemplary case as it ran the gamut of problems also seen elsewhere. Prior to their removal from power, the military realised their position was weak, so they issued a law absolving themselves and the “terrorists” from liability for offences.<sup>148</sup> This did not, however, prevent the incoming President, Alfonsín, from campaigning on the platform of accountability. When he came to power he did not forget his promises, and initiated prosecutions against high ranking members of the *junta*. To do this he needed to overturn the amnesty law. This was done by the Supreme Court declaring the amnesty unconstitutional.<sup>149</sup> Nine military officials, including two ex-presidents, were tried for the national equivalents of what would internationally be classified as crimes against humanity. After this, a more wide ranging scheme of prosecutions was instituted. The military, fearful of further accountability began to stall the prosecutions, this was done by the military courts (who had initial jurisdiction over the offences) not taking up cases,<sup>150</sup>

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<sup>146</sup> K. Ambos, “Impunity and International Criminal Law: A Case Study on Colombia, Peru, Bolivia, Chile and Argentina” (1997) 18 *H.R.L.J.* 1. See also Robertson, *supra* n.67, pp.248-258 who gives a summary of various Latin American approaches to past crimes.

<sup>147</sup> See A. Garro & H. Dahl “Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward” (1987) 8 *H.R.L.J.* 283; E.F. Mignone, C. L. Estlund & S. Issacharoff, “Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina” (1984) 10 *Yale J.I.L.* 118. The series of events in Argentina is told, from the perspective of a government adviser, in C.S. Nino, *Radical Evil on Trial* (New Haven: Yale U.P., 1996).

<sup>148</sup> Garro & Dahl *ibid.*, p.301.

<sup>149</sup> *Ibid.*, p.305. At p.306 they admit that it took an “innovative” reading of the constitution to achieve this result. Judgment of October 4, 1984 C. Fed. Crim. Corr. 1st Chamber, LL Feb 19 1985.

<sup>150</sup> They had done this with respect to the first nine also.



the military protecting officers who refused to co-operate and then threatening a *coup*.<sup>151</sup> This led to the prosecutions being brought to an end.

These features of the Argentinean move to democracy show some of the problems involved in prosecutions of nationals. Very powerful interest groups may be opposed to prosecution, and can exert political pressure. When that group includes the army (and, of course armies and State apparatuses are in almost unique positions in having the power to commit wide-scale international crimes) problems become very serious, as the threat of prevention of prosecutions by force, if necessary is a serious one which cannot be ignored. When negotiations occur for transfers of power a frequent demand is immunity from prosecution. Negotiators often feel that this must be the price to be paid for obtaining the removal of a regime that may be responsible for, and may be continuing to, commit offences which amount to crimes against humanity.

There are multifarious policy based arguments both for and against the use of amnesties.<sup>152</sup> There are also serious questions over their compatibility with international human rights law.<sup>153</sup> The primary argument in their favour is that they may be a necessary evil, being an integral part of a transfer of power from an abusive regime to one which (it must be hoped) will not commit international crimes.<sup>154</sup> Another is that they allow the country to move forward, rather than wallowing in past miseries, picking at the scabs.<sup>155</sup>

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<sup>151</sup> S.R. Ratner & J. Abrams, *Accountability for Human Rights Atrocities in International Law* (Oxford: OUP, 1997) p.149.

<sup>152</sup> For surveys, see, for example, S. Cohen, "State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past" (1995) 20 *L. & Soc. Inquiry* 7; M. Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998).

<sup>153</sup> See generally, *supra* pp.118-120, see also, for example Human Rights Committee, General Comment 20, UN. Doc. CCPR/C/21/rev.1/Add3, para 15, "[a]mnesties are generally incompatible with the duty of States to investigate such acts, to guarantee prosecution of such offences... States may not deprive individuals of the right to an effective remedy including compensation and such full rehabilitation as may be possible". Where there is a duty to prosecute offences, amnesties must be contrary to those treaty provisions, where there is not, an amnesty (with immunity from criminal, not civil law) may be legal. This fact is probably the inspiration for the intimation of a duty to prosecute. The HRC was discussing torture, which has a treaty based duty to prosecute.

<sup>154</sup> The transfer to a regime that has not committed international crimes since coming to power was the situation in South Africa, where democratic elections in 1994 returned the ANC, and were a sophisticated form of amnesty provision was brought in. For secondary literature on this see L. Berat & Y. Shain, "Retribution or Truth Telling in South Africa: Legacies of the Transitional Period" (1995) 20 *L. & Soc. Inquiry* 163. For an account of the work of the Truth and Reconciliation Commission see A. Krog, *Country of my Skull* (London: Vintage, 1999). For a comparison of prosecutions and truth commissions, with particular reference

There are also arguments undermining the over zealous advocacy of amnesties.<sup>156</sup> It is all too easy for amnesties to be demanded by perpetrators of atrocities, who are eager to invoke the flexible rhetoric of reconciliation (while simultaneously threatening further abuses if they do not get their way).<sup>157</sup> The line between amnesty and impunity is thin, at best. As Osiel points out the consent to such amnesties is often coerced.<sup>158</sup> Perhaps what is required to circumvent this objection is some form of international scrutiny of such amnesties. In the long run amnesties are not always determinative, as the Cambodian and Chilean situations have shown.<sup>159</sup> It would appear that truth commissions and amnesties don't allow people to move on, and victims do not give up their desire for criminal prosecution of those responsible for international crimes.<sup>160</sup> Lastly, as international crimes are the concern of all, a domestic amnesty does not divest other courts of their universal jurisdiction over international crimes, and any attempt of a domestic amnesty provision to do so would be an illegal assertion of extraterritorial effect.<sup>161</sup> Only one of the 12 judges who sat on the 1<sup>st</sup> and 3<sup>rd</sup> *Pinochet* appeals considered the Chilean amnesty as relevant to the extradition request by Spain.<sup>162</sup> The utility of amnesties is thus questionable, and there

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to South Africa see R.J. Goldstone, "Justice as a Tool for Peace-Making: Truth Commissions and International Tribunals" (1996) 28 *N.Y.U.J.I.L. & Politics* 485.

<sup>155</sup> Minow makes much of the healing power of truth commissions, *supra* n.152, pp.61-85. Reconciliation, healing and moving forward are frequent themes in discussion of amnesties, when used with truth commissions. Others, such as Y. Tamir, question the psychological assumptions that these rest upon, comments extracted in H. Steiner & P. Alston, *Human Rights in Context: Law, Politics, Morals* (Oxford: OUP, 2<sup>nd</sup> ed. 2000) pp.1127-1128. Others argue, that amnesties violate a moral duty to the victims, who are left struggling, trying to put the past behind them, while their oppressors enjoy a comfortable retirement. M.P.Scharf, "Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes In Haiti?" (1996) 31 *Tex. I.L.J.* 1, p.14-15.

<sup>156</sup> For other reflections, see the Introduction, notes 19-20.

<sup>157</sup> For an analysis of concerns on this point, see S. Dwyer, "Reconciliation for Realists" (1999) 13 *Ethics & I. Aff.* 81, pp.82, 98. As Aryeh Neier remarks, "Those decreeing amnesties... often manage to be the main beneficiaries" A. Neier, *War Crimes: Brutality, Genocide and the Struggle for Justice* (New York: Random House, 1998), p.96.

<sup>158</sup> M. Osiel, "Why Prosecute?: Critics of Punishment for Mass Atrocity" (2000) 22 *H.R.Q.* 118, p.138

<sup>159</sup> On Cambodia, see, *supra*, p.179 In Chile, the Supreme Court has now removed General Pinochet's immunity from prosecution. His immunity was part of the deal allowing a democratic transfer.

<sup>160</sup> As Minow, *supra* n.152, p.123 points out, in Argentina, hopes for accountability surged when there was an arrest of someone suspected of child abduction in the *junta*, and that one paper responded with the headline "God exists". The Mothers of the Disappeared were a public reminder that the yearning for reckoning never went away. There have been various legal challenges to amnesties, which display dissatisfaction with them, see, for example *AZAPO v Truth and Reconciliation Commission* 1996 (4) SA 671. On this case see N. Boister & R. Burchill, "The International Legal Definition of the South African Armed Conflict in South African Courts: War of National Liberation, Civil War, or War at All?" (1998) 45 *N.I.L.R.* 348. Scharf, *supra* n.153, pp.13-14 also questions whether States, rather than the victims themselves have the moral right to bargain away other's rights.

<sup>161</sup> T.J Farer, "Restraining the Barbarians: Can International Criminal Law Help?" (2000) 22 *H.R.Q.* 90, p.115; Robinson, *supra* n.67, p.242.

<sup>162</sup> *Supra* n.67.



are always concerns about the extent to which they are self-interested, or extorted. To the extent that there is no duty to prosecute the activities though, they are not necessarily illegal.<sup>163</sup>

Amnesties were not relevant for the two IMTs. In both situations there was no formal amnesty. What the existence of the IMT's did not do was prevent the later amnesties in Germany and Japan, and the early release of many of the defendants convicted in the subsequent proceedings.<sup>164</sup> As both of the IMTs prosecuted the top level offenders, the issue of amnesty could not arise as it has in national amnesties, where the highest level offenders negotiate their immunity from prosecution. In the debates preceding the Nuremberg IMT amnesty was unthinkable, all the options suggested involved some form of retributive activity.<sup>165</sup>

Amnesties were suggested as an option in Former Yugoslavia, particularly between 1993 and 1995, when the Dayton Peace Agreement ended the conflict. Many, although by no means all, commentators dealing with the ICTY were dubious about the possibility of achieving both peace and justice (as the issue was often rather euphemistically framed).<sup>166</sup> Shortly before the Dayton negotiations were entered into the political and military leaders of the *Republika Sprska* were indicted, and it is probable that this was the reason they were excluded from any peace negotiations.<sup>167</sup> Their exclusion may also have been one of the

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<sup>163</sup> J. Dugard, "Reconciliation and Justice: The South African Experience" (1998) 8 *Transnational L. & Contemporary Problems* 277, p.285.

<sup>164</sup> See T. Bower, *Blind Eye to Murder* (London: Little, Brown & Co. 1995); R.J. Pritchard, "The Gift of Clemency Following the British War Crimes Trials in the Far East 1946-8" (1996) 7 *Crim. L.F.* 15.

<sup>165</sup> See, e.g. A. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Durham: North Carolina U.P., 1998), *passim*. Outside the official realm, some thought there should not be a trial, but a political disposition, Lord Hankey, *Politics, Trials and Errors* (Oxford: Pen-in-Hand, 1950).

<sup>166</sup> For some of this literature see K.A. Hochkammer, "The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics and International Law" (1994) 28 *Vand. J.T.L.* 119; A. D'Amato, "Peace v Accountability in Bosnia" (1994) 88 *A.J.I.L.* 500 *contra* the correspondence in (1994) 88 *A.J.I.L.* 717, 717, & (1995) 89 *A.J.I.L.* 93, see also D'Amato's response, (1995) 89 *A.J.I.L.* 94. For a particularly controversial example, see Anonymous, "Human Rights in Peace Negotiations" (1996) 18 *H.R.Q.* 249. Some countries may have felt this way, see Forsythe, *supra* n.32, pp.187-190; for a balanced view see O. Schuett, "The International War Crimes Tribunal for Former Yugoslavia and the Dayton Peace Agreement: Peace Versus Justice?" (1997) 4 *I. Peacekeeping* 91. In favour of prosecutions, see L. Schmandt, "Peace With Justice: Is It Possible for Former Yugoslavia?" (1995) 30 *Texas I.L.J.* 335; P. Akhavan, "The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond" (1996) 18 *H.R.Q.* 259.

<sup>167</sup> D.J. Scheffer, "International Judicial Intervention" (1996) 102 *Foreign Policy* 34, p.44; Akhavan, *ibid* p.272.

reasons that the Dayton agreement did not contain any provision for amnesty.<sup>168</sup> It is possible that informal, personal amnesties were granted to at least some of the negotiators,<sup>169</sup> but the option of a formal amnesty seemed to be closed off, if not by the creation of the ICTY, then by its indictments. This was repeated in 1999 by the indictment of Slobodan Milosevic during the Kosovo campaign, with Prosecutor Arbour ensuring that no amnesty be given to the top Yugoslav leadership for their activity in Kosovo by indicting them. This would make any amnesty sought appear entirely self-interested, and demonstrably undercutting the rhetoric of reconciliation, which is already suspect.<sup>170</sup> It would also make it politically more difficult to get an amnesty for a different reason. It is considered a larger inroad into the independence of the judicial function to stop ongoing procedures than it is to prevent them being brought at all, thus an amnesty relating to particular, pre-existing cases is a larger political concession than one arising in the abstract, further stacking the deck against the acceptance of amnesties.

Unsurprisingly, the issue of amnesties did not arise in relation to the ICTR. Like the Nuremberg and Tokyo IMTs, the ICTR was created after the close of large-scale hostilities by a defeat. The primary candidates for indictment were therefore in no position to attempt to bargain away their responsibility. Also, as there is a clear duty to prosecute genocide at least territorially or in an international criminal tribunal, an amnesty could be challenged on this basis.

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<sup>168</sup> Scheffer, *ibid.* p.42 alleges that an amnesty was never suggested at Dayton, however the Anonymous *H.R.Q.* article is fiercely critical of ICTY prosecutor Richard Goldstone for suggesting Milosevic was a suspect during the Dayton negotiations, as “without a doubt this ran the risk of complicating the task of the peace negotiators”. Bothe (*supra* n.30, p.586) speculates that the peace negotiations took no longer because of the threat of punishment, but this could be for a variety of reasons, including that informally the negotiators were promised immunity.

<sup>169</sup> As Forsythe notes “it appears highly likely that Slobodan Milosevic... was at least implicitly promised some type of immunity from prosecution in return for his reducing support to the Bosnian Serbs and agreeing to the Dayton and Paris Accords”, D. Forsythe, “International Criminal Courts: A Political View” (1997) 15 *N.Q.H.R.* 5, p.11. If he was, his 1999 indictment shows the fragility of such informal deals. Also although no public indictment has been proffered against Milosevic the practice of the ICTY to rely on indictments that are not made public means that the absence of a public indictment is not indicative of there being no indictment at all.

<sup>170</sup> *Supra* n.157.



The Rome Statute is ambiguous on amnesties. This is probably because the issue was deliberately not discussed systematically at Rome, partially at the insistence of NGOs.<sup>171</sup> Arsanjani discloses that on its face, the Statute appears hostile to amnesties.<sup>172</sup> The preamble reads “affirming that the most serious crimes of concern to the international community as a whole must not go unpunished ... [and that States parties are] determined to put an end to impunity for the perpetrators of these crimes”.<sup>173</sup> There are claims that pursuant to Article 17(1)(b) a State could allege that it had investigated a crime and come to a decision not to prosecute if, for example an amnesty had been accompanied with a truth commission.<sup>174</sup> It could be, that such activity would fall under Article 17(2), i.e. that the proceedings were designed to shield the person from the jurisdiction of the court, or there is an unjustifiable delay in bringing the person to justice, such that the State’s intent to bring the person to justice is questionable.<sup>175</sup> Arguments of this nature may miss the point, as Article 17 is probably referring to a criminal investigation,<sup>176</sup> and not a sweeping historical study of a series of events. For crimes (such as genocide) where there is an obligation to prosecute,<sup>177</sup> the court is unlikely to accept an amnesty in violation of international law as fulfilling the complementarity provisions.<sup>178</sup>

The prosecutor may have the option of taking an amnesty into account when deciding, under Article 53 that there are “substantial reasons to believe that an

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<sup>171</sup> M. Arsanjani, “The Rome Statute of the International Criminal Court” (1999) 93 *A.J.I.L.* 22, p.38. G. Hafner, K. Boon, A Rübesame & J. Huston, “A Response to the American View as Presented by Ruth Wedgwood” (1999) 10 *E.J.I.L.* 108, p.109 assert that there were discussions on amnesties. If so, they were probably not extensive. For criticism of the way which the Rome conference dealt with amnesties, see R. Wedgwood, “The International Criminal Court: An American View” (1999) 10 *E.J.I.L.* 93, pp. 95-97.

<sup>172</sup> M. Arsanjani, “The International Criminal court and National Amnesty Laws” (1999) 93 *Proc. A.S.I.L.* 65, p.67.

<sup>173</sup> Rome Statute preambular paragraphs 4-5 see Hafner *et al.*, *supra* n.171 pp.110-111.

<sup>174</sup> D. Sarooshi, “The Statute of the International Criminal Court” (1999) 48 *I.C.L.Q.* 387, p.393.

<sup>175</sup> A. O’Shea, “The Statute of the International Criminal Court” (1999) 116 *S.A.L.J.* 243, p.251.

<sup>176</sup> A similar argument, arrived at independently, can be found in M.P Scharf, “The Amnesty Exception to the Jurisdiction of the International Criminal Court” (1999) 32 *Cornell I.L.J.* 507, p.525.

<sup>177</sup> See above, pp.114-115 and Hafner *et al.*, *supra* n.171, pp.111-112.

<sup>178</sup> Pursuant to Article 20 (on which see M. McAuliffe de Guzman, “Article 20” in Triffterer, *supra* n.31, 435), the ICC is to apply, in order, the statute, treaties and principles of international law, and “failing that” general principles of national law derived by the court from national laws... including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crimes, provided that those principles are not inconsistent with this statute and with international law”. As international law is to be applied in a hierarchically superior way to general principles of national law (which amnesties are not in any case) the Court would be more likely to interpret the Statute in a way antithetical to the acceptance of amnesties.

investigation would not serve the interests of justice”.<sup>179</sup> As this decision, if one must be taken, is one within the ICC, and reviewable by the Court,<sup>180</sup> the decision is not left to a single State.<sup>181</sup> Also, as Wedgwood notes as it is out of the provenance of any one State to decide, it makes threats of a return to military rule less likely.<sup>182</sup>

There is one way that an amnesty could be effected by States. This is if they could persuade the Security Council to pass a positive resolution, every 12 months, under Article 16, as part of a peace settlement. It is unlikely that the Security Council could obtain a majority with permanent five consensus on such a resolution for an indefinite period of time, although it is not impossible. To conclude on amnesties, the Rome Statute, although not entirely ruling them out *a priori* makes the possibility of wide ranging amnesties less feasible.

## THE JUDICIAL SYSTEM

It is obvious that for prosecution, a pre-requisite is a functioning judicial system. This may not be the case. In certain countries there simply is no judicial system, either due to a pre-existing absence, or destruction and looting of it by the old regime.<sup>183</sup> This situation is particularly acute in developing countries. For example, in Ethiopia, there was really no judicial system left to speak of, and there were a large number of defendants, this will probably lead to over-reliance on guilty pleas and amnesties,<sup>184</sup> both of which, as policies, are problematic. In addition, the Ethiopian authorities are effectively having to start from scratch, with inexperienced staff, and chronic underfunding for such a huge undertaking.

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<sup>179</sup> On Article 53 see M. Bergsmo & P. Kruger, “Article 53” in Triffterer, *supra* n.31, 701. Arsanjani, *supra* n.172, p.67, Hafner *et al.*, *supra* n pp.112-113, all agree that Article 53 could take amnesties into account.

<sup>180</sup> Under Article 53(3).

<sup>181</sup> Hafner *et al.* *supra* n.171, p.113.

<sup>182</sup> Wedgwood, *supra* n.171, p.96.

<sup>183</sup> It may also be the case that there is no judiciary which can be trusted, due to its complicity with the old regime. In El-Salvador, the UN Truth Commission suggested that trials not be undertaken, partly as the judiciary was part of the problem during the repressions, and recommended that the entire Supreme Court resign, Report of the UN Commission on Truth for El-Salvador, 15 March 1993, UN Doc. S/255500, p.1177. The Nazi “people’s judges” were prosecuted in the *Justice Case*, (*US v Alstötter* (1947) 15 *A.D.* 278) In the situation of a complicit judiciary, similar considerations apply as to when there is no judiciary, particularly as regards the ICC.

<sup>184</sup> See Ratner & Abrams *supra* n.151, pp.152-3.



In Ethiopia judges may be appointed with no formal legal training, and it is clear that the judges appointed are inadequately prepared.<sup>185</sup> The consequences of such inexperience and underfunding are frequently violations of human rights, in particular by virtue of extended holding without charge, as both people and evidence cannot be efficiently dealt with.<sup>186</sup> This is in spite of some international help and monitoring.

These problems have been even more pronounced in Rwanda. In Rwanda the new regime was left with not even a skeletal judicial structure, the retreating regime had destroyed or removed every possible part of it, right down to office supplies. The genocide left no more than a minuscule number of professional lawyers.<sup>187</sup> There was no trained prosecutorial authorities or police. Due to this, in addition to the government's professed aim of trying those responsible, the military began to prepare case files and arrest suspects, despite a lack of constitutional authority.<sup>188</sup> As a result of inexperience, urgency and the upheavals in Rwanda, thousands of people have been, and are being held in Rwanda, having been arrested and detained with little respect for due process.<sup>189</sup> This has led to a huge problem, even though professional prosecutors have taken over, progress is slow, and due to the total inadequacy of the holding institutions, at least 2,000 people have died in custody.<sup>190</sup>

Creating accountability for a tragedy of the magnitude of that which struck Rwanda would strain the most modern of judicial systems. In Rwanda, of 147 district courts in January 1996 100 were not functioning. More judges were only appointed from May 1996.<sup>191</sup> The situation is improving slowly, but at the same time over 100,000 people are

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<sup>185</sup> J.Y. Mayfield, "The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act" (1995) 9 *Emory I.L.J.* 553, p.590.

<sup>186</sup> Ratner & Abrams *supra* n.151, p.154.

<sup>187</sup> C. Ferstman, "Domestic Trials for Genocide and Crimes Against Humanity: The Example of Rwanda" (1997) 9 *R.A.D.I.C.* 857, p.859, at p.870 she claims that at the start of trials, there were only sixteen practising lawyers in Rwanda. On the trials generally see M. Drumbl, "Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials" (1998) 29 *Columbia H.R.L.R.* 545.

<sup>188</sup> *Ibid.*, p.861.

<sup>189</sup> *Ibid.* See also Ratner & Abrams *supra* n.151, p.155.

<sup>190</sup> Ratner & Abrams, *ibid.* Article 14(3)(c) gives the right to trial "without undue delay".

<sup>191</sup> See generally R. Degni-Ségui "Report on the Situation of Human Rights in Rwanda" Report to the Commission on Human Rights e/cn.4/1997/61. 20 January 1997, paras 62-70. W.A. Schabas, "Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems" (1996)

being held on remand in appalling conditions. Even the improvements are bringing their own problems. Given the urgency of getting the system running, judges who are to preside over genocide trials are lay persons, who are only given a four month training course.<sup>192</sup> This has led to many problems of due process, as inexperienced judges are having to learn the essentials of procedure whilst presiding over trials in which the defendants are on trial for their lives.<sup>193</sup> Violations are made much more likely due to the almost complete lack of defence lawyers in Rwanda. Trials began in December 1996, the Rwandan Bar was only set up in mid 1997, by which time a number of people had been sentenced to death.<sup>194</sup> These early trials have been the subject of an adverse Amnesty International report,<sup>195</sup> and there have been various violations of international standards. These include defendants not having lawyers at trial.<sup>196</sup> This has led to defendants being tried while being unaware of their right to call defence witnesses.<sup>197</sup> In addition, even where there has been legal representation, there has been insufficient time to prepare a defence, as they are only made aware of the particulars of the case against them at most a few days before trial.<sup>198</sup> Lastly, there are instances where prosecution witnesses have not appeared in person, thus were not subject to examination.<sup>199</sup>

Even the government of Rwanda admits that there has been shortcomings in the trials, but claims that improvements are being made.<sup>200</sup> This claim has only partially been borne out by recent reports. Improvements are being made, more witnesses are appearing

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7 *Crim. L.F.* 523, 534 notes that no judicial system in existence could deal with the level of offences involved in Rwanda in 1994.

<sup>192</sup> Ferstman, *supra* n.187, p.862.

<sup>193</sup> See Degni-Ségui, *supra* n.191, paras 64-70. Unlike the ICTR, Rwanda has the death penalty for genocide. See Organic Law of 08.96. It is important to remember that the imposition of the death sentence following a trial which does not conform to the fair trial human rights also amounts to a violation of the right to life, See *Mbenge v Zaire* (1983) *Selected Decisions of the H.R.C.* 76.

<sup>194</sup> See R. Coomaraswamy, "Report of Special Rapporteur on Violence Against Women, its Causes and Consequences" Addendum to "Report of the Mission to Rwanda on the Issues of Violence Against Women in Situations of Armed Conflict" e/cn.4/54/add.1. 4. February 1998, para. 6.

<sup>195</sup> *Rwanda: Unfair Trials: Justice Denied* (London: Amnesty International, 1997).

<sup>196</sup> In a genocide trial where the death penalty is a likelihood, this violates Art 14 (3)(d) ICCPR. There is only a duty to provide a free lawyer when "the interests of justice so require", A capital case is such an instance. See e.g. *Robinson v Jamaica* HRC No 232/1987. See also M. Nowak (ed.), *CCPR Commentary* (Kehl am Rhein: Engel, 1994) p.260.

<sup>197</sup> Coomaraswamy, *supra* n.194, para 5.

<sup>198</sup> Ferstman, *supra* n.187, p.871-874. This amounts to a violation of Article 14(3)(b) ICCPR. See Nowack *supra* n.196, p.256. See also HRC General Comment 13, 39 UNGAOR Supp. 40 A/39/40 annex VI. para. 9.

<sup>199</sup> *Ibid.* This probably amounts to a violation of Article 14 (3)(e).



in person, more time is being given to prepare cases and representation is increasing (especially where the NGO *Advocats sans Frontières* is able to work). However there are still large problems in outlying areas, and sentencing rates still remain high enough to cause concern (in trials up to June 1997 70% of defendants were sentenced to death or life imprisonment).<sup>201</sup>

As can be seen, creating a justice system quickly may be important, but in fledgling systems human rights violations are a serious problem, as the inexperienced system struggles to learn how to live up to its own promises when both funding and experience are short. Things improve as more trials are completed, but this is at a high cost to those who are the guinea pigs of these judicial experimentations.

The problem of a collapse of a judicial system was one of the factors that made the ICTR essential. This shows a way international criminal tribunals can help, by providing a forum for trial when prosecutions *in locus delicti* are not possible because that State has no judiciary. This idea was taken up in the Rome Statute. One of the functions of the ICC is to step into the gap left in a national jurisdiction. The ICC's complementarity provision in Article 17, provides that one of the circumstances it may take jurisdiction over a case is where "due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".<sup>202</sup>

Neither the ICTR or the ICC alone are complete solutions. The number of offences they can prosecute is small, as they have limited judges themselves. So they cannot replace an entire national judiciary themselves.<sup>203</sup> Although their prosecutions may also spur other States to prosecute offences from the same conflict, in conflicts where there are huge numbers of perpetrators efforts must be made to support the re-creation of a

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<sup>200</sup> *Ibid.* p.870.

<sup>201</sup> See HRFOR "Report of the UNCHR" e/cn.4/1998/61, HRFOR "Genocide Trials to 20<sup>th</sup> June 1997" 15 July 1997.

<sup>202</sup> Article 17(1), as interpreted in Article 17(3).

national judiciary in the affected State (which is likely to be the State with the greatest interest in prosecution). This has happened in Rwanda,<sup>204</sup> but as the ICC is not yet functioning, any suggestion that it could assist in re-creating national judicial structures must be speculative. One way it may be likely to have a positive effect is if the Prosecutor is able to make timely investigations. Evidence perishes, and the Prosecutor is likely to be happy to share it with States with a *bona fide* wish to prosecute, but who could not obtain it in a timely fashion.

## CONCLUDING REMARKS

Until recently, the level of prosecution of international crimes has been a cruel joke. The gap between the rhetoric and practice of States in the field of international criminal law has been a chasm.<sup>205</sup> Even States who would seek to prosecute international crimes in utmost good faith have been put off by the difficulties involved and concerns based on grounds of sovereignty. Where there has been enforcement, its selectivity undermines the universal nature of the offences. The early international criminal courts (the two IMTs) were as open to criticisms of selectivity as any of the national proceedings, despite their universalist cant. The ICTY, for the early years of its mandate (pre-Kosovo), was not subject to these critiques, although there have been allegations of selectivity (made in good faith and otherwise) on the grounds that NATO actions are not being investigated. The ICTR has been criticised on the grounds that it could have been given jurisdiction over earlier offences. The primary critique of the nature of the two UN Tribunals,

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<sup>203</sup> There is also the possible problem that the Rome Statute, in its co-operation provisions presumes the existence of a national legal system capable of compliance.

<sup>204</sup> P.H. Sennett & G.P. Noone, "Working With Rwanda Toward the Domestic Prosecution of Genocide Crimes" (1997) 12 *St.J.J.L.C.* 425.

<sup>205</sup> See H. von Hebel, "The International Criminal Court-A Historical Perspective" in von Hebel *et al* (eds.), *supra* n.36, 13, p.14 "The apparent contradiction between the norms and non observances of these norms shows the need for better methods of enforcement".



though, is that they were reactive, and limited to single conflicts. Their creation raised memories of unprosecuted crimes elsewhere. Despite there being evidence of similar policies operating to prevent prosecution at the national and international level, the ICC will be the least selective attempt to enforce international criminal law to date and, despite its defects (such as Article 16) the promulgation of the Statute could amount to a Hegelian moment in the development of the international society/community.

The international criminal courts that have been brought into existence by States have helped overcome some of the practical problems States have had in prosecuting international crimes. In addition to those discussed in chapter 3, problems of cost and judicial structures in post-atrocity societies have, in particular, been alleviated by international criminal courts, or will be (it may be hoped) by the ICC. These may not be the most important contributions that have been, or will be, made by international criminal courts. The creation of the international criminal tribunals has also operated at a deeper level, that of values.<sup>206</sup> As Simma has shown, one of the most certain methods of inculcating value is institutionalisation.<sup>207</sup> The creation of the first two tribunals (the Nuremberg and Tokyo IMTs) served to raise the values enshrined in international criminal law from nebulous claims to the rank of particular aspirations, if nothing else. Although little concrete happened before the end of the Cold War, the activities of the Security Council in setting up the ICTY and ICTR provided impetus for the creation of the Rome Statute, which both reflects, and contributes to the entrenchment of these values, although they have not yet become fully integrated into the international community as yet, as the jurisdictional provisions of the Rome Statute show.

The actions of the courts at the level of value can clearly be seen by the congruity between the *locus delicti* of offences prosecuted internationally and nationally. Where the

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<sup>206</sup> D. McGoldrick, "The Permanent International Court: An End to the Culture of Impunity" [1999] *Crim. L.R.* 627, p.654; A. Bos, "International Criminal Court: Recent Developments" in von Hebel *et al* (eds.), *ibid* 39, p.45, "the adoption of the Statute means that as regards the most serious crimes that exist, international society has evolved into an international community"

<sup>207</sup> B. Simma, "From Bilateralism to Community interest in International Law" (1994) VI 250 *R.d.C.* 217, p.285.

former have prosecuted, the latter have followed. Reflecting upon Simma's definition of community interests,<sup>208</sup> it is difficult to avoid the conclusion that the reification of the values underlying international criminal law prohibitions has begun. The old, sovereigntist concerns States have about enforcing international criminal law appear to fall away like old cobwebs in the wind when international criminal courts have prosecuted offences from a conflict. There are now signs (although no more than signs) that there is a spillover effect of these courts, prodding States into overcoming their sovereignty scruples for all international crimes.

This is a giant leap forward for international criminal law, although whether it proves long enough to bridge the chasm between rhetoric and practice remains to be seen. There are some other positive indications, however. For example, there is an increasing trend away from amnesties, not only in terms of acceptability, but also it is now accepted that if such things are acceptable at all, the Rome Statute has internationalised their scrutiny to a greater degree than was the case. The ICC and its Prosecutor, should it be determined that any amnesty is not acceptable, will be able to proceed to act over the amnesty, and prosecute malefactors. Although human rights bodies have previously scrutinised amnesties, the ICC, if it allows amnesties at all represents the culmination of that process, showing that States are not entitled to dispose of liability unilaterally, thus vindicating, and reinforcing, the values enshrined in international criminal law. The subjection of amnesty to such scrutiny is particularly important, as these are normally attempted by regimes who have committed atrocities against their own populations. Thus unlike war crimes in international armed conflict, there is no inter-State victimisation. There is no room for triumphalism yet though, particularly with the current US hostility to the Rome Statute. Nor is this the only problem, even the ICC will not be able to prosecute offences on a universal basis without any selectivity. As will be seen in the next two chapters, the choices made on crimes for inclusion, and definitions of those crimes, (and principles of

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<sup>208</sup> *Ibid.*, p.233, "a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se*, but is recognized and sanctioned by international law as of



liability) in the Rome Statute serve to render the law applied by the ICC selective when compared to customary law.

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concern to all States”.

# CHAPTER 5 SELECTIVITY IN THE LAW 1:DEFINITIONS OF CRIMES

## INTRODUCTION

As this thesis concentrates on the enforcement of international criminal law, it is necessary to see the extent to which international criminal law has been incorporated both into national and international enforcement mechanisms. Charlesworth and Chinkin make the observation that “the practical value of international standards depends largely on their implementation into domestic legal systems”.<sup>1</sup> It in no way devalues this insight to make the further comment that similar considerations apply to the international criminal courts which have had a disproportionately large role in the past in the enforcement of international criminal law. With the coming into being of the Rome Statute, which will have an important effect on national incorporation of international criminal law, there is a synergy forming between the definitions in the Rome Statute and those which are likely to be incorporated into national criminal codes. This chapter will evaluate both national and international enforcement mechanisms to evaluate the extent to which incorporated rules conform to international law.

With respect to offences, such as genocide (under universal jurisdiction), crimes against humanity and war crimes not amounting to Grave Breaches it is difficult to conclude there is a definite, universal duty to prosecute. This is critical. If prosecution is discretionary, then although States may prosecute, they do not have to. This is relevant

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<sup>1</sup> H. Charlesworth & C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: MUP, 2000) p.113. Lucas Andrews criticises approaches centring on enforcement, arguing that they betray a yearning for Austinianism, L. Andrews, “Sailing Around the Flat Earth: The International Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory” (1997) 11 *Emory I.L.R.* 471. The answer to this is



for definitions of crimes for the following reason. In offences for which there is a duty to prosecute, defining a crime more narrowly than international law can lead to a violation of international law. This violation may arise as when the incorporated definition of the offence is narrower than the international law definition, acts falling under the broader definition but not the narrower incorporation will not be criminal at the domestic level. Therefore certain acts for which there is a duty to prosecute will either not be prosecuted, or the accused obtain an acquittal to which they would not be entitled to under the definition provided by international law. The same may not be true of those for which prosecution is discretionary, unless the offence bears so little relation to the international offence that it cannot be seen as similar enough to the international crime for international law to grant universal jurisdiction over the activities criminalised.<sup>2</sup>

This is not the case where broader definitions of existing crimes are adopted, or new categories of crimes are created *ex post facto*. These are liable to fall foul of the principles of legality *nullum crimen sine lege* and *nullum poena sine lege*.<sup>3</sup> These are contained in all the major human rights treaties, and are also likely to be considered general principles of law in the sense of Article 38(1)(c) of the ICJ Statute.<sup>4</sup>

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that although international law cannot rest on Austinian theory, international lawyers nonetheless do not reject the importance of the creation of compliance mechanisms, whatever they may be in the individual case.

<sup>2</sup> Of course, if the State prosecuting for such a crime did not have e.g. nationality or territorial jurisdiction, then prosecution would be *ultra vires* with respect to international law. A State is free to legislate on these grounds, the offence would, however, be a national offence only, not one under international law. In addition, it is highly likely that such an assumption of jurisdiction over a foreign State's nationals would violate the prosecuting States international obligations to the accused nationality state on the treatment of aliens, or amount to a violation of the principle of non-intervention.

<sup>3</sup> See 1966 International Covenant on Civil and Political Rights, 999 UNTS 177, Article 15; 1951 European Convention on Human Rights, 213 UNTS 221, Article 7; 1969 Inter-American Convention on Human Rights, PAUTS 36, Article 9; 1981 African Charter of Human and Peoples' Rights (1982) 21 *I.L.M.* 59 Article 7(2).

<sup>4</sup> See R. Higgins, "Time and the Law, International Perspectives on an Old Problem" (1997) 46 *I.C.L.Q.* 501, pp.507-508; M.C Bassiouni, *Crimes Against Humanity in International Criminal Law* (The Hague: Martinus Nijhoff, 2<sup>nd</sup> ed. 1999) chapter 3; S.R. Ratner & J.S. Abrams, *Accountability for Human Rights Atrocities in International Law* (Oxford: OUP, 1997) pp.19-22. As they note, as international law relies on custom, as well as treaty law, this issue can be difficult (the relevant human rights treaties all accept that international law criminalises certain conduct and these laws are not necessarily treaty based). There are also difficulties of interpretation of the prohibition. Some, for example Ireland, seeing it as a strict principle prohibiting any retroactive penal measures (G. Ireland, "Ex Post facto From Rome to Tokyo" (1946) 21 *Temple L.Q.* 27). Ratner & Abrams take a similar approach, stating that not only must the act be prohibited by law, but also the law must assign criminal responsibility for violation of that rule, (*ibid.*, p.21). Others, including the Nuremberg IMT see (or saw) it as a defeasible presumption of justice (IMT Judgment, (1947) 41 *A.J.I.L.* 173, pp.216-7). Others take an interim position, saying that the prohibition is not violated if the act was clearly wrong (see T. Meron, "International Criminalization of Internal Atrocities" (1995) 89 *A.J.I.L.* 554, p.566, C. Greenwood, "International Humanitarian Law and the Tadic Case" (1996) 7 *E.J.I.L.* 265, p.281). This was also the position

To a certain extent the definitional problems are a result of the traditionally vague and incomplete nature of international criminal law. International criminal law norms have not traditionally been set down with great precision, thus definitions of at least some international crimes are open to interpretation and opinion. This leaves room for definitional debates in which national interests are often as important, if not more so, than fidelity to the law.<sup>5</sup>

The jurisdictional reach of tribunals also create issues of legitimacy. As Franck notes, determinacy is a component of legitimacy, the more determinate a rule is, the greater its “compliance pull”.<sup>6</sup> As will be seen, the definitions of certain international crimes have not traditionally scored highly on this count. Determinacy may not be enough here though. As Morris and Scharf note, excessively wide views of the ambit of international crimes undermine the legitimacy of that law, given that it is not seen as an impartial formulation, but based more on “considerations of political expediency or a result oriented approach”.<sup>7</sup> A similar issue arises where the definition used is manifestly more limited than customary international law. In this instance, the impression given is that the definition is created, not as a result of an impartial survey of authority, but as a means to an end, i.e. exculpation of those accused. Both over, and under-inclusiveness, in definitions can amount to a form of selectivity, because they amount to a choice to render certain conduct criminal or not, on the alleged basis of international law, in an enforcement mechanism irrespective of whether international law does so. Frequently, as will be seen, definitions are broader when States are prosecuting “others” than when the definitions will also be jurisdictionally applicable to the authors of the laws also. This is

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of the European Court of Human Rights, in *S.W. v UK*, Decision of 27 November 1995, ECHR Reports, Series A, Vol.335-B, and R. Higgins, *ibid.*, p.508.

<sup>5</sup> This led one commentator to suggest that it would be impossible to get agreement on the definition of any crimes, and that it would be “intellectually appealing but completely impractical” to attempt to define the crimes in the Rome Statute, as it took the ILC (which he claims is a “non political body”) 50 years to reach the 1996 Draft Code of Crimes. He suggests that the Statute should merely state the categories of crime, and leave it to the tribunal to decide their parameters-J. Dugard, “Obstacles in the Way of an International Criminal Court” (1997) 56 *Cambridge L.J.* 329, p.332. As will be seen, this would be even less practicable given that it would amount to offering the tribunal a legislative power, a power States have jealously guarded where the law may be applied against their nationals.

<sup>6</sup> T.M. Franck, *The Power of Legitimacy Among Nations* (Oxford: OUP, 1990) p.50.

<sup>7</sup> V. Morris & M.P. Scharf, *The International Criminal Tribunal for Rwanda* (New York: Transnational, 1998) p.127.



clearest in international criminal courts. Hence discussion in this chapter and the next will centre primarily upon those courts, although it must be borne in mind that with the coming into force of the Rome Statute, national criminal laws based on international criminal law are likely to be modelled on the Statute.

## INCORPORATION OF INTERNATIONAL CRIMINAL LAW INTO NATIONAL LEGAL SYSTEMS

It would be simple if the status of international criminal law in national criminal law could be dealt with at the level of theory, namely in relation to the debate surrounding the monist/dualist positions.<sup>8</sup> If monism prevailed, questions of States' legislation's conformity with international law would not arise. Unfortunately, neither monist or dualist theory can adequately explain all the aspects of international law. Monism does not adequately explain aspects of international practice (for example the, UK and Commonwealth States' insistence on implementing legislation for treaties),<sup>9</sup> or the idea of non-self executing treaties. Dualism, on the other hand has been hard pressed to explain the practice of a great number of States, who apply customary international law, and treaties directly in the municipal sphere,<sup>10</sup> the rise of the EU,<sup>11</sup> and more importantly, the

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<sup>8</sup> On this (arguably sterile) debate, see, e.g. H. Kelsen, *Principles of International Law* (London: Stevens, 2<sup>nd</sup> ed. 1967) pp.553-88.; L. Ferrari-Bravo, "International and Municipal Law: The Complementarity of Legal Systems" in R. St. J. Macdonald & D.M. Johnson, *Structure and Process of International Law* (Dordrecht: Martinus Nijhoff, 1986) 715; A. Wasilkowski, "Monism and Dualism at Present" in J. Makarczyk, (ed.), *Theory of International Law at the Threshold of the 21<sup>st</sup> Century*, (The Hague: Kluwer, 1997) 323; A. Boye, "The Application of the Rules of International Public Law in Municipal Systems" in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (The Hague: Martinus Nijhoff, 1991) 289; L. Erades (M. Fitzmaurice & C. Flinterman (eds.), *Interactions Between International and Municipal Law; A Comparative Case Law Study* (The Hague: T.M.C. Asser Instituut, 1993) pp.549-945; A. Rubin, *Ethics and Authority in International Law* (Cambridge: CUP, 1997) pp.83-124, 150-162. On this point, Fitzmaurice's platitude that there is no common field of application for the two laws, and thus no possibility of conflict (G. Fitzmaurice, "The General Principles of International Law Considered From the Standpoint of the Rule of Law" (1957) II 92 *R.d.C.* 5, pp.70-80) cannot apply here. The two theories lead to radically different results, in a common field, i.e. criminal liability for the individual, in a State without implementing legislation, monism would conclude there is liability which may be enforced by national courts, dualism would not.

<sup>9</sup> See Erades, *ibid.*, pp.699-841 (a survey of various States' approaches), in particular pp.840-1 (concluding that ex-British colonies almost all consider themselves to require implementing legislation).

<sup>10</sup> *Ibid.* pp.565-679 (survey of national jurisdictions) and p.698 (concluding that almost all countries apply customary international law directly)

<sup>11</sup> See Wasilkowski, *supra* n.8, pp.323, 328, 333-35

place of individuals,<sup>12</sup> both as the bearers of rights (for example, in human rights legislation), and duties (under international criminal law).<sup>13</sup> A failure to implement international obligations domestically when there is a duty to do so in international law is a violation of international law. It does not, however, prevent individual liability arising under international law. International criminal law, it must be said, has an implicit monist bent, as its demands are directed to individuals, and liability arises irrespective of national law. The direct effect of international law was upheld by the Nuremberg IMT,<sup>14</sup> and has found acceptance in State practice.<sup>15</sup> In any event, as Erades notes, “practice does not need direct doctrinal pronouncement in order to exist”,<sup>16</sup> and given the differing State practices, it is necessary to look at the methods they have used, and their conformity with international law.

There are three ways in which States discharge their obligations to implement international criminal law. Some States, such as the UK, Canada, the US, the Netherlands, Sweden and Switzerland, use implementing legislation, creating the offence in national law. Others rely on the direct applicability of international law in the national legal system,<sup>17</sup> whilst the remainder of those prosecuting merely use analogous national or military offences (for example the US in the prosecution of William Calley).<sup>18</sup> Not all these methods are necessarily acceptable.<sup>19</sup> When there is a duty to prosecute, national implementation of international crimes which are narrower than the definitions given in

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<sup>12</sup> *Ibid.* p.528.

<sup>13</sup> The inability of strict dualism to explain international criminal law that lies at the basis of Rubin’s rejection of international criminal law, Rubin, *supra* n.8

<sup>14</sup> Which proclaimed “individuals have international duties which transcend the national obligations of obedience imposed by the individual state” IMT Judgment, *supra* n.4, p.221.

<sup>15</sup> See for example, the British Manual of Military Law (Part III) (London: HMSO, 1958) para 1. It is worthwhile noting that this part of the manual was drafted by Sir Hersch Lauterpacht, an unabashed monist.

<sup>16</sup> *Supra* n.8, p.857.

<sup>17</sup> In this respect, Malaysia has done this on at least one occasion, *Stanislaus Kroftan v Public Prosecutor* (1967) 1 *Malaysian L.J.* 133.

<sup>18</sup> 48 CMR. (1973), 22 U.S.C.M.A. 534 (1973).

<sup>19</sup> See A. Marschik, “The Politics of Prosecution: The European National Approach to War Crimes” in T.L.H. McCormack & G.J. Simpson (eds.), *The Law of War Crimes* (The Hague: Kluwer, 1997) , p.73. For an extended discussion of the place of humanitarian law in national law see M. Bothe, T. Kurzidem & P. Macalister-Smith *National Implementation of Humanitarian Law* (Dordrecht: Martinus Nijhoff, 1990). The ICRC is of the opinion that “in most cases normal penal legislation...is inadequate to ensure repression of breaches of the Geneva Conventions” ICRC 1969 Comments, CE/Com/IV/14.



international law is a violation of that duty, as it could lead to acquittals which would not be warranted under international law.

Some States have incorporated the Geneva Conventions in an acceptable fashion,<sup>20</sup> but the legislation of some countries with respect to the Geneva and Genocide Conventions is non-existent or is otherwise unsatisfactory.<sup>21</sup> Indeed it has been said that there is an “alarming degree of failure” in legislative implementation of the Geneva Conventions.<sup>22</sup> Of those that have incorporated the Geneva Conventions, practice is, in the words of Bothe “so far...mediocre”.<sup>23</sup> Many countries have not defined the crimes adequately or accepted jurisdiction widely enough. For example, the US legislation, was issued 40 years late,<sup>24</sup> and fails to embrace the universality principle, although the Conventions require it to.<sup>25</sup>

The same could be said for the Genocide Convention. For example by the time of the genocide in Rwanda (1994), and despite Rwanda’s accession to the convention on 16th April 1975, it had still not introduced national legislation prohibiting genocide.<sup>26</sup> In relation to genocide the US legislation is also insufficient. Whilst its claims of jurisdiction are wider than required under the convention (although not beyond what is permitted by customary law),<sup>27</sup> the legislation is seriously flawed in relation to the definitional elements of the crime. This is when discussing the (already high) *mens rea* requirement for genocide, to the formula of the convention “with intent to destroy, in whole, or in part” the US legislation adds a “substantial” qualification to “in part”. As Paust notes, this creates a

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<sup>20</sup> For example the UK Geneva Conventions Act 1957.

<sup>21</sup> Whilst legislation should be used, on at least one occasion, a court has simply applied them irrespective of national implementation, see *supra* n.17.

<sup>22</sup> K. Drzewicki “National Legislation as a Measure for Implementation of Humanitarian Law” in F. Kalshoven & Y. Sandoz *Implementation of International Humanitarian Law* (Dordrecht: Martinus Nijhoff, 1989), 109 at p. 109.

<sup>23</sup> M. Bothe “National Implementation of International Humanitarian Law” in C. Swinarski (ed.) *Studies and Essays on International Humanitarian Law in Honour of Jean Pictet* (Geneva: ICRC, 1984), 31, p.307.

<sup>24</sup> The US ratified the conventions in 1955, the legislation entered into force in 1996.

<sup>25</sup> See M. Zaid, “Remarks (1997) 91 *Proc.A.S.I.L.* 275.

<sup>26</sup> See C. Ferstman, “Domestic Trials for Genocide and Crimes Against Humanity: The example of Rwanda” (1997) 9 *R.A.D.I.C.* 857, p.863.

<sup>27</sup> The US legislation provides for territorial and nationality jurisdiction. 18 USC 1091(d).

“nearly impossible threshold”<sup>28</sup>, which will make the possibility of prosecution in the US almost negligible. Paust goes as far as to claim that the US legislation “demonstrates that national legislative efforts can be quite disingenuous and dangerous”.<sup>29</sup> A more obvious example of this is the notorious requirement in the French cases on crimes against humanity that the actions be undertaken on behalf of a State following a “hegemonic ideology”.<sup>30</sup> A plausible explanation of the inclusion of this requirement was that it excluded (up until the *Papon* trial), those acting for the Vichy regime *per se* from liability for crimes against humanity.<sup>31</sup> This was a clear example of selectivity by definition.

## INTERNATIONAL TRIBUNALS

The decisions on the offences included, their definitions, and the general rules of liability betray precisely the same policy choices as those relating to the structure and powers of international tribunals, and also to those underlying national implementation of international crimes. That is to say, when States are creating what Michael Bothe has termed a "safe" law enforcement mechanism (one which is unlikely to assert jurisdiction over their, or their nationals' activities),<sup>32</sup> a very different view is taken of the law than when there is the possibility of the tribunal exercising jurisdiction over those actions.

Where there is a separation between the authority to create the tribunal, and the State(s) over whose nationals jurisdiction is going to be asserted, a far wider view of the law is taken, usually to the detriment of the (putative) defendants. The types of offence

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<sup>28</sup> J. Paust *International Law as Law of the United States* (Durham: North Carolina U.P., 1996), p.294, on 18 USC 1091(a) and 1093(a).

<sup>29</sup> J. Paust "Threats to Accountability after Nuremberg: Crimes Against Humanity, Leader Responsibility and National Fora" (1995) 12 *N.Y.L.S.J.H.R.* 555, p.562. See also, L.J. le Blanc, "The Intent to Destroy Groups in the Genocide Convention: The Proposed US Understanding" (1984) 78 *A.J.I.L.* 369, p.378, who describes the political "pettiness" of the debates in the US Senate relating to the ratification of the Genocide Convention but supports the US interpretation; B. Bryant & R.H Jones, "The United States and the Genocide Convention" (1975) 16 *Harvard I.L.J.* 683, who consider the proposed (at the time) interpretation as incorrect.

<sup>30</sup> See *supra* pp.149-150.

<sup>31</sup> *Ibid.*

<sup>32</sup> M. Bothe, "International Humanitarian Law and War Crimes Tribunals: Recent Developments and



included, and their definitions are broadened, defences are limited. Either that, or all the law is merely left vague or unstated, and it is left for the court to determine what the international law on the subject is. The converse seems to be the case whenever there is the possibility of the court exercising its jurisdiction over its creators.<sup>33</sup> In addition, definitional precision is insisted upon, as although States may be content to allow a court to determine the law for other States, they are unwilling to concede to the court a power to make law binding themselves.<sup>34</sup> It must be remembered that the possibility of leaving definitions to the court was omitted from the ILC Draft Statute for precisely the reason that doing so would amount to giving the court a quasi-legislative role.<sup>35</sup>

To achieve full comprehension of the approaches taken by States, it is necessary to understand their influences on the creation of the tribunals. For this, it is necessary to look at the drafting histories of the Statutes, differentiating a “safe” enforcement mechanism, from an “unsafe” one.

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## DRAFTING HISTORY OF THE STATUTES

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### SEPARATION BETWEEN DEFINING AUTHORITY AND POSSIBLE SUBJECTS

This separation of authority was exceptionally clear in the post-War tribunals (the Nuremberg and Tokyo IMTs). In both courts, there was complete separation between those drafting the law and creating the tribunal, and its subjects. The Nuremberg Charter was drafted in the London Conference, which consisted of representatives of the big four

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Perspectives” in K. Wellens (ed.) *International Law: Theory and Practice* (The Hague: Kluwer, 1998) 581, p.593.

<sup>33</sup> As Blakesley notes, the more crimes added to a court's competence, the greater the inroad into the sovereignty of the States subject to the reach of the court. C. Blakesley, “Obstacles to the Creation of an International Criminal Court” (1994) 18 *Fl.F.Wld.Aff.* 77, p.77. The same can be said for wider definitions of existing categories of crime. A ready example is the expansion of international humanitarian law, which traditionally only applied between States in international conflicts, to regulation of a State's treatment of its own population in civil war. It is clear that in the gradual redefinition of the laws of war to include certain acts perpetrated in civil war, States have had their sovereignty limited.

<sup>34</sup> It is also noteworthy that detailed definitions are difficult to draft by consensus, and present huge opportunities for filibustering.

<sup>35</sup> See J. Crawford, “The ILC Adopts a Statute for an International Criminal Court” (1995) 89 *A.J.I.L.* 404, p.411.

powers.<sup>36</sup> The possibility of having a German or neutral jurist at the conference was never even considered. In addition to this, due to the comprehensive defeat of Germany in the War, and the absence of any German government which could object to their formulations of international law, the representatives were free to pursue their objective of ensuring “the conviction and punishment for the Nazi defendants”.<sup>37</sup> How much this dominance of the victors impacted itself on the law will thus be examined in the chapter. At this point it is worth mentioning the comments made by David Maxwell-Fyfe,<sup>38</sup> and those of Robert Jackson. Jackson criticised a Soviet proposal as “it seems to me to leave the tribunal in the position where it could be argued, and the tribunal might very reasonably say, that no personal responsibility resulted if we failed to say it when we are making an agreement between the four powers which fulfils in a sense the function of legislation. I think there is greater authority in us to declare principles as we see them now than there would be in a court to use new principles that we failed to declare in an organic act setting up the court”.<sup>39</sup>

Although the details of the drafting of the Charter of the Tokyo IMT are far less available than for the Nuremberg Charter (nothing similar to the Jackson Report describes the birth of the Tokyo Charter),<sup>40</sup> certain points may be raised. The US Chief prosecutor, without consultation with the other Allies, never mind any neutral or Japanese representatives, drafted the Charter himself.<sup>41</sup> Also, the Charter, in relation to the law applied was very similar to the London Charter for the Nuremberg IMT,<sup>42</sup> so in

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<sup>36</sup> See A. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Durham North Carolina: Carolina U.P., 1998) pp.222,226.

<sup>37</sup> M. Lippman, “Nuremberg: Forty Five Years Later” (1991) 7 *Connecticut J.I.L.* 1, p.37. See also Bassiouni, *supra* n.4, p.16 (“The facts were to drive the law..it was designed to produce a pre-ordained result”; Blakesley, *supra* n.33, p.80; B.F. Smith, *Reaching Judgment at Nuremberg* (London: André Deutsch, 1977) p.62.

<sup>38</sup> “I want to make clear in this document what are the things for which the Tribunal can punish the defendants. I don’t want it left to the Tribunal to interpret what are the principles of international law that it should apply... it should not be left to the Tribunal to say what is or what is not a violation of international law... What we want to abolish at the trial is a discussion as to whether the acts are violations of international law or not. We declare what international law is...” R. Jackson, *Report of Robert H Jackson: US Representative to the International Conference on Military Trials* (Washington: US Government Printing Office, 1945) pp.328-9, 399.

<sup>39</sup> *Ibid.* p.311.

<sup>40</sup> The Jackson Report transcribed the details of the London Conference.

<sup>41</sup> S. Horwitz, “The Tokyo Trial”, (1950) 465 *International Conciliation* 478, p.480.

<sup>42</sup> C. Hosoya, “Preface” in C. Hosoya, Y. Onuma, N. Ando & R. Minear, (eds.), *The Tokyo Trial: An International Symposium* (Tokyo, Kodanasha, 1986) 1, p.9.



many ways, similar policies and attitudes can be presumed to have been at work. As was the case in the London Conference, the law was drafted by the winning side in the war, for application to the opposing side in that war, who had little chance to complain about its nature. Together these two IMTs represent a pair.

The drafting process for the ICTY Statute was partially different. The decision to create the ICTY was taken by the Security Council, which was not a party to the Yugoslav conflict,<sup>43</sup> nor (at the time) were any of its members. The decision to create the ICTY was formalised in Resolution 808 which asked the Secretary-General of the United Nations to prepare a report on the creation of a tribunal, and to write its Statute. This is quite remarkable in some respects. The power to make the final decision on what was in the Statute was passed by the Security Council (and the States comprising it), to an entirely non-State based entity, the Office of the Secretary General, (in practice the UN Office of Legal Affairs (OLA)).<sup>44</sup> Bassiouni gives two reasons for this, first, that the members of the Security Council realised that they would have problems drafting it themselves. Secondly, they knew the OLA would be drafting it, so some States knew that they could influence the contents of the Statute, albeit confidentially.<sup>45</sup> The former is almost undoubtedly correct, the latter is open to question, given that the reports given by the States were public, and suggestions in their reports were clearly not all taken up.<sup>46</sup> Of course, in an organ like the Security Council the possibilities of influence cannot be ruled out. That said, the Secretary-General was given an unprecedented power to determine the structure of the tribunal, and the body of law which it was to apply. Of course, even

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<sup>43</sup> That is not to say the Security Council had been silent on the Yugoslav conflict.

<sup>44</sup> See M.C. Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for Yugoslavia* (N.Y: Transnational, 1996) pp.221-225; D. Schraga & R. Zacklin, "The International Criminal Tribunal for Yugoslavia" (1994) 5 *E.J.I.L.* 360, pp.361-262. The decisions of the Secretary-General on the law were, so long as they were not clearly capricious, final. This was because the report was intended to be passed without change, as the members of the Security Council knew that to open the Statute up to amendment would effectively open a Pandora's Box of possible amendments, and would ensure the non passage of the Statute (Bassiouni & Manikas, *ibid.*, pp.225).

<sup>45</sup> *Ibid.* p.221.

<sup>46</sup> Reports, including suggestions for Statutes were given by France (UN Doc. S/25266), Italy (UN Doc. S/25300), the Islamic Conference (UN Doc. S/25512), the Russian Federation (UN Doc. S/25536), Canada (UN Doc. S/25594), the Netherlands (UN Doc. S/25716) and the US (UN Doc. S/25575). Most notable suggestion in a State report, which was not taken up in the Statute, was the US proposal that the Statute determine the conflict to be international. (S/25575. Article 10(a)).

though the Security Council was likely to adopt the fruits of the Secretary General's (and OLA's) labours, if the report went far beyond what was acceptable, it would not have been adopted. Either certain members of the Security Council or the UN generally would have (in the former case) either refused to pass the report, or (in the latter) actively opposed the ICTY (and sealed its fate by opposing its funding).<sup>47</sup> This limitation, along with the commitment of the UN to human rights,<sup>48</sup> perhaps led the Secretary-General to assert that "the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence to some but not all States to specific conventions does not arise".<sup>49</sup>

#### UNITY OF DEFINING AUTHORITY AND POSSIBLE SUBJECTS

Although the Rwanda Statute was created by the same body as the ICTY (the Security Council), the way in which the Statute was drafted was very different. Here the Statute was drafted by the US and New Zealand, with input from Rwanda, who, at the time, was a member of the Security Council.<sup>50</sup> This is an exceptionally important factor, as not only did parts of the membership of the Security Council retain, in themselves, the right to draft the Statute, but also, the State who was to be subject to the jurisdiction of the court was in a position to not only object to any particular formulation of the law, but

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<sup>47</sup> It is perhaps an interesting aside to note that whilst it is now unlikely that the strenuous opposition of a small minority of UN members could seriously endanger the existence of the ICTY, at the time this possibility was substantially greater. In itself, this is strong evidence of how the continued existence of the ICTY has altered the perception of such bodies, and how this has led to the onus arguably now being on those to prove the case against such bodies, rather than (as seemed to be the case at the time of the creation of the ICTY) on those who sought to create them.

<sup>48</sup> See UN Charter Articles 1(1) & 55.

<sup>49</sup> *Report, supra* n.46, para 34. With respect, the comment of the Secretary-General here betrays certain elisions and misconceptions. He conflates the *nullum crimen* principle with the adherence of all States to conventions, customary international law is more complex than that (see e.g. M.E. Villiger, *Customary International Law and Treaties* (The Hague: Kluwer, 2<sup>nd</sup> ed. 1997). In addition, he ignores the fact that the SFRY (and thus all its successors) were parties to all the relevant humanitarian law conventions (the four Geneva Conventions and both Additional Protocols).

<sup>50</sup> See R.S. Lee, "The Rwanda Tribunal" (1996) 9 *L.J.I.L.* 37, p.9; D. Schraga & R. Zacklin, "The International Criminal Tribunal for Rwanda" (1996) 7 *E.J.I.L.* 501, p.504. One point to note is that the Secretary-General's initial report on the ICTR (Report Pursuant to Paragraph 5 of Security Council Resolution 955 UN Doc. S/1995/134) is not, like his report on the ICTY, the reflections of the drafter of the Statute, but merely his (or



also to attempt to influence the formulation itself.<sup>51</sup> As Rwanda was a non-permanent member of the Security Council, of course, it could not veto the creation of the ICTR, although it did vote against it.<sup>52</sup> Still, here we see the first example of the creation of an international criminal court where there was not a total separation between the authority creating the tribunal and the State (or nationals thereof) which was to be subject of the Tribunal.

The most prominent example of unity between the authority to define the law and its possible subjects is the Rome Statute. Here, for the first time the Statute was not reactive, and all States' nationals at the Rome conference were, at least theoretically, potential defendants before the court. The negotiations themselves were particularly difficult, and in the end, the Bureau had to create a package deal on which States voted.<sup>53</sup> Due to this unity of authority, Robinson asserted that "given the interest of participating States in knowing the precise contours of the corresponding obligations... [definitions of crimes could be expected to be more detailed and]... one might expect the definition[s] to be more restrictive than previous definitions".<sup>54</sup> This would certainly seem to correspond with the opinions of certain delegations, at least some of whom agreed with the US spokesman who asserted: "[t]his court should not... be in the business of deciding even what is a crime. This is not the place for progressive development of the law into uncertain areas, or for the elaboration of new and uncertain international criminal law.

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the OLA's) opinion. Unlike the Secretary-General's report on the ICTY Statute, therefore, it cannot fulfil an analogous role to *travaux préparatoires* of a treaty.

<sup>51</sup> Schraga & Zacklin, *ibid.* p.504, note that more than the ICTY Statute, the ICTR represented a negotiated outcome. It is instructive to note that one of the reasons Rwanda voted against the Resolution creating the ICTR (SC Resolution 955) was that it included crimes they did not wish to be included in the Statute. See S/PV. 3453, pp.15.

<sup>52</sup> *Ibid.*

<sup>53</sup> See P. Kirsch & J.T. Holmes, "The Rome Conference on an International Criminal Court: The Negotiating Process" (1999) 93 *A.J.I.L.* 2, *passim*, particularly pp.5-9. The fact that the US requested the vote creates an interesting parallel with the passage of Resolution 827, which was also considered imperfect by the US. Resolution 827 was supported very vociferously by the US, who did not wish to reopen the package, preferring to have the court set up. In Rome the US complained that the proposals they made to alter the package deal (which they knew was a take-it-or-leave-it deal) were not discussed and they were not at the centre of all the drafting of the Statute. See D. Scheffer, "The United States and the International Criminal Court" (1999) 93 *A.J.I.L.* 12, p20.

<sup>54</sup> D. Robinson, "Defining Crimes Against Humanity at the Rome Conference" (1999) 93 *A.J.I.L.* 43, p.43. See also R. Higgins, "International Law in a Changing International System" (1999) 58 *Cambridge L.J.* 78, p. 88 who agrees that the ICC will be subject to more political control on the definitions of crimes than the UN Tribunals.

The court must concern itself with those atrocities which are universally recognized as wrongful and condemned.”<sup>55</sup> The extent to which these underlying facts have manifested themselves in the choices of crimes, and their definitions of those crimes is the subject of the remainder of this chapter.

## THE CRIMES

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### AGGRESSION

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The first appearance of the crime of aggression was in the Statutes of the Nuremberg and Tokyo IMTs. The formulation was basically the same. Article 6(a) of the London Charter criminalised the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishing of any of the foregoing.”<sup>56</sup> This provision has caused a great deal of controversy,<sup>57</sup> so it is necessary to see the extent to which the crime had a basis in existing international law.

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<sup>55</sup> Representative of the US to the General Assembly 23 October 1997 (Agenda Item 150), cited in N. Boister “The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court” (1998) 3 *J.A.C.L.* 27, p.28. Boister, *ibid.* reports that the EC and others agreed with these sentiments. It is interesting to compare these comments with those of Justice Jackson at the London Conference, *supra* n.38.

<sup>56</sup> 1945 London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279. Article 5(a) of the Charter of the International Military Tribunal for the Far East 2 Bevans 20 is essentially the same.

<sup>57</sup> See, for example, M.C. Bassiouni & B.B. Ferencz, “The Crime Against Peace” in M.C. Bassiouni (ed.) *International Criminal Law Vol.I: Crimes* (New York: Transnational, 2<sup>nd</sup> ed., 1999) 313; B.B. Ferencz, “The Crime of Aggression” in G.G. McDonald & O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law* (The Hague: Kluwer, 2000) 33; S. Glueck, *The Nuremberg Trial and Aggressive War* (N.Y: Knopf, 1946) (in this he recanted his earlier rejection of the charge, and claimed that initiating an aggressive war was a customary crime prior to 1945); Q. Wright, “The Law of the Nuremberg Trial” (1947) 41 *A.J.I.L.* 38, p.63; H. Lauterpacht (ed.), *Oppenheim’s International Law Vol. II The Law of War* (London: Longmans, 7<sup>th</sup> ed. 1952) p.579; B.V.A. Röling, “Crimes Against Peace” in A. Cassese, (ed.) *The Current Legal Regulation of the Use of Force* (Dordrecht: Martinus Nijhoff, 1986) 385; I.I. Lukashuk & J.F. Murphy “Crimes Against Peace” in G. Ginsburgs & V.I. Kudriavstev (eds.), *The Nuremberg Trial in International Law* (Dordrecht: Martinus Nijhoff, 1990) 121, (the above supporting the legality of the aggressive war charge). H. Ehard, “The Nuremberg Trial Against the Major War Criminals and International Law” (1949) 43 *A.J.I.L.* 223, pp.236-239; H. Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?” (1947) 1 *I.L.Q.* 153, p.155-158; R. Minear, *Victor’s Justice: The Tokyo War Crimes Trial* (Princeton: Princeton U.P., 1971) pp.47-55.; G. Schwarzenberger, *International Law as Applied by International Court and Tribunals: Vol II, The Law of Armed Conflict* (London: Stevens & Sons, 1968) pp.485-494; S. Glueck, *War Criminals, their Prosecution and Punishment* (New York: Knopf, 1944) pp.37-38; R.K. Woetzel, *The Nuremberg Trials and International Law* (London: Stevens & Sons, 1962) pp.163-171 L. Gross, “The Criminality of Aggressive War” (1947) 41 *A.P.S.R.* 205 (Claiming the charge not to be justified by the previous law).



In antiquity, there were precedents for trial of persons for waging aggressive wars. The first of these was in 1268, of Conradin von Hohenstaufen.<sup>58</sup> Like the trial of Peter von Hagenbach,<sup>59</sup> this trial preceded the evolution of modern international law, so its precedential value is dubious. Similarly the US *Opinion of the Attorney General*<sup>60</sup>, is of little help. It related to the actions of private individuals.<sup>61</sup> The delegates at London never cited them as precedent to justify their decision to include the charge, and it is unlikely they were even aware of them. At that time, and certainly by the end of the 19<sup>th</sup> Century, a State's right to go to war was considered to be an attribute of sovereignty, and not regulated, other than procedurally, by international law.<sup>62</sup> The question of whether the initiation of an aggressive war was criminal was raised by the 1919 Commission, who answered the question in the negative.<sup>63</sup> It is instructive that the Treaty of Versailles limited itself to demanding the Kaiser be "publicly arraigned for a supreme offence against international morality",<sup>64</sup> not an offence against international criminal law.

After the First World War, certain international documents did refer to aggressive war as an international crime. The first of these was the League of Nations sponsored 1923 Draft Treaty of Mutual Assistance, which, in Article 1 proclaimed that aggressive war was an international crime.<sup>65</sup> It was never ratified. A year later the criminality of aggressive war was reasserted in the League Protocol for the Pacific Settlement of International Disputes.<sup>66</sup> Again this remained unratified. In 1927, the League of Nations Assembly unanimously adopted a resolution proclaiming that aggressive war was a

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<sup>58</sup> See M.C.Bassiouni, "International Law and The Holocaust" (1979) 9 *Cal. W.I.L.J.* 202, p.206. Other examples are cited by Wright, *ibid.* p.62.

<sup>59</sup> See p.22.

<sup>60</sup> Opinion of 26 January 1797 (reprinted in J. Paust, M.C. Bassiouni, S. Williams, M.P. Scharf, J. Gurulé & B. Zagari, *International Criminal Law: Cases and Materials* (Durham, N.C.: Carolina U.P., 1996), p.199.

<sup>61</sup> Liability for aggression has always been limited to high level governmental officials, see Y. Dinstein, "The Distinctions Between War Crimes and Crimes Against Peace" in Y. Dinstein & M. Tabory (eds.), *War Crimes in International Law* (The Hague: Martinus Nijhoff, 1996) 1, pp.5-6.

<sup>62</sup> See W.E. Hall, *International Law* (Oxford: OUP, 8<sup>th</sup> ed., 1924) p.82; Y. Dinstein, *War, Aggression and Self-Defence* (Cambridge: Grotius, 2<sup>nd</sup> ed., 1994) pp.69-80.

<sup>63</sup> Report of the Commission on the Responsibility of the Authors of the War and on Enforcement (1919), Reprinted in Morris & Scharf, *supra* n.7, (Vol. 2) 419, pp.439-440.

<sup>64</sup> Versailles Treaty of Peace, 28 June 1919, 225 Consolidated T.S. 188, Article 227.

<sup>65</sup> Cited in IMT Judgment, *supra* n.4, p.219.

<sup>66</sup> *Ibid.*

crime.<sup>67</sup> This sentiment was repeated in a resolution of the Pan American Conference on 18 February 1928.<sup>68</sup> The cumulative effect of these draft treaties is controversial: Glueck, for example considers that from these documents “one may reasonably conclude that the time had arrived in the life of civilised nations when an international custom has developed to hold aggressive war to be an international crime”.<sup>69</sup> Glueck’s view has also been criticised by others,<sup>70</sup> and it seems unlikely that two draft conventions without a ratification between them, and two non-binding resolutions of non-universal international bodies, could be considered sufficient authority to ground an international crime in positive international law. It is interesting that the Nuremberg IMT did not actually assert that this was the case, instead limiting itself to saying they evidenced “the prohibition of aggressive war demanded by the conscience of the world”,<sup>71</sup> and using them to interpret the only inter-war convention which really had a bearing on the matter.

This was the Pact of Paris (the Kellogg-Briand Pact).<sup>72</sup> Article 1 of the Pact stated that the parties (of which there were 63)<sup>73</sup> condemned recourse to war and renounced it as an instrument of national policy. It did not provide for individual criminal responsibility. The effect of this Treaty is subject to dispute. Judge Pal in the Tokyo IMT, claimed that it was not a legal instrument in the usual sense of the word, merely a pious expression of hope.<sup>74</sup> There were large numbers of reservations to the treaty, asserting a right of autointerpretative self-defence, which could deprive the prohibition in

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<sup>67</sup> *Ibid.*, 219-220.

<sup>68</sup> *Ibid.*, p.220.

<sup>69</sup> Glueck (*Aggressive War*), *supra* n.57, p.26. Kudriavtsev, (V.N. Kudriavstev, “The Nuremberg Trial and the Problem of Strengthening the International Legal Order” in Ginsburgs & Kudriavstev, *supra* n.57, 1, p.2) perhaps goes the furthest of any scholar, asserting that these were only declaratory, and initiating an aggressive war was a crime in customary international law by the 1920s. The only other similar assertion was that of Lord Phillimore in the ICJ, which was not taken up by that body. (Lord Phillimore, “An International Criminal Court and the Resolutions of the Committee of Jurists” (1922-23) 7 *B.Y.B.I.L.* 79, pp.81-82).

<sup>70</sup> See, for example, W. Bosch, *Judgement On Nuremberg: American Attitudes Towards the Major German War Crimes Trials* (Durham, N.C: North Carolina U.P, 1970) p.58.; Dissenting Opinion of the Member for India, Judge Pal, in R.J Pritchard & S.M. Zaide, *The Tokyo War Crimes Trial Vol. 21: Separate Opinions* (New York: Garland, 1981) pp.70-76; Opinion of Judge Röling, *ibid.*, pp.14-26.

<sup>71</sup> Nuremberg IMT Judgment, *supra* n.4, p.220. The “conscience of the world” could not be assimilated to State based *opinio juris*.

<sup>72</sup> 1928 General Treaty for the Renunciation of War as an Instrument of National Policy, (1929) UKTS 29 Cmnd. 3410.

<sup>73</sup> See M. Bowman & D.J. Harris, *Multilateral Treaties, Index and Current Status* (Nottingham: University of Nottingham Treaty Centre) & 11<sup>th</sup> supplement, Treaty 115. There are now 67 parties.

<sup>74</sup> Pal, *supra* n.70, p.90-102.



the Pact of some of its usefulness, but the prohibition was not considered wholly inchoate by its parties.<sup>75</sup> The problematic aspect of basing the international *criminality* of aggressive war on the Pact is that it does not expressly provide for it. The normal consequence of treaty violation is the violating State coming under a duty to make reparation.<sup>76</sup> On the other hand, the silence of a treaty relating to individual responsibility does not determine whether or not the treaty concerned creates a crime.<sup>77</sup> The issue is one of intent of the parties.<sup>78</sup> Here the resolutions may be relevant. The problem with this line of argument is, as Glueck has noted “the great majority of expressions of contemporary public opinion...were far from regarding it as an international penal Statute”.<sup>79</sup> The possibility of individual liability did not appear in the 1934 ILA Interpretative Articles for the Pact.<sup>80</sup> Furthermore it is highly questionable that the US, particularly in her isolationist period would have suggested or signed a treaty which could have led to individual liability.<sup>81</sup> There was no subsequent practice confirming individual liability and it is telling that Stimson said that the condemnation for violations of the pact was that the States (not individuals) were “law breakers”, he did not refer to them as criminals.<sup>82</sup>

Perhaps the best evidence for the effect of the Pact is the position of the Allies during the war. During the war the crime was not under the mandate of the UNWCC, and it appears that “only one year before the London Conference three of the big four

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<sup>75</sup> Support for the legal nature of the obligation may be taken from a statement of US Secretary of State H. Stimson in 1932, where he noted that due to the Pact, when nations go to war, at least one of them should be “denounce[d]... as law breakers” (cited in Nuremberg IMT Judgment, *supra* n.4, p.218).

<sup>76</sup> *Chorzow Factory Case* 1 W.C.R. 646, pp.664, 667-8.

<sup>77</sup> This is the case for the Hague Convention IV which does not contain a provision on individual liability, but violations of it generally considered to entail individual liability. That said, the laws of war have traditionally entailed individual liability, (see Smith, *supra* n.37, p.156). Thus the implication that the Hague convention also does so is not so difficult to make as for the Pact of Paris, which effectively extended the law in a novel way.

<sup>78</sup> Woetzel, *supra* n.57, p.166.

<sup>79</sup> Glueck, *War Criminals*, *supra* n.57, p.19.

<sup>80</sup> ILA-Report of the 38<sup>th</sup> Conference (Budapest, 1934) pp.1-78, especially pp.66-68. See P. Calvocoressi, *Nuremberg, the Facts, the Law and the Consequences* (London: Chatto & Windus, 1946) p.36.

<sup>81</sup> Lippman, *supra* n.37, p.44. 70 years on its position on aggression (so far as it could relate to itself, rather than anyone else), was unchanged, see Ferencz, *supra* n.57, p.61.

<sup>82</sup> Stimson’s statement is taken from the Nuremberg IMT Judgment, *supra* n.4, p.218. Stimson later effectively admitted that the charge was new, defending it on the ground that it had “not been established in international law at the expense of any innocent lives” (H. Stimson, “The Nuremberg Trial: Landmark in Law” (1947) 25 *Foreign Aff.* 179, p.188).

had gone on record that aggressive war was not in itself a crime.”<sup>83</sup> At the London Conference both the USSR and France were shocked by the suggestion of the inclusion of a charge of aggressive war, not considering it to be based on international law at all.<sup>84</sup> The British were also dubious about the international law grounding of any such charge.<sup>85</sup> This did not stop them signing the crime into being for the Nuremberg IMT (and accepting it in Tokyo). At both the Nuremberg and Tokyo IMTs the defence challenged the legality of the aggressive war charge. The Nuremberg IMT (with whom the Tokyo IMT majority concurred) could be seen to be a little uncomfortable with the inclusion of aggressive war as an international crime, the Nuremberg IMT’s discussion of the *nullum crimen sine lege* principle occurs in the section of the judgment relating to crimes against peace (aggression). Despite asserting that the London Charter was “decisive and binding”<sup>86</sup> the Nuremberg IMT went out of its way to attempt to prove that the Charter was in accordance with international law. Their attempts to prove this relied on the resolutions cited above to show that with the Pact of Paris “the solemn renunciation of war... necessarily involves the proposition that such a war is illegal in international law, and those who plan and wage such a war... are committing a crime in so doing.”<sup>87</sup> The view that violations of the Pact entailed criminal responsibility is rejected above. The Tokyo IMT judgments are interesting on this point, as the two dissenting judges asserted that the charge was not part of international law<sup>88</sup> and one of the concurring judges preferred to base the offence on natural law.<sup>89</sup> In all it is clear that this charge could only be accepted on the basis of an exceptionally broad view of the sources of international law and was, in reality, created *ex post facto*.

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<sup>83</sup> Minear, *supra* n.57, p.50. These were the UK, France & the US. Various internal US memoranda (including one written by Francis Biddle, later the US judge at the Nuremberg IMT) adopted the position that aggressive war was not a crime. See Lukashuk & Murphy, *supra* n.57, p.141.

<sup>84</sup> Jackson report, *supra* n.38, pp.65-67, 295, 327, 335.

<sup>85</sup> See Minear, *supra* n.57, p.48.

<sup>86</sup> Nuremberg IMT Judgment, *supra* n.4, p.216.

<sup>87</sup> *Ibid.*, p.218.

<sup>88</sup> Judge Pal, believing that it was not supportable, rejected the charge outright, Pal, *supra* n.70, pp.1,226. Judge Röling, although he did not consider it to be legally supportable as a charge claimed that there was a right to incarcerate peace breakers, thus it was an acceptable political action, B.V.A. Röling & A. Cassese, *The Tokyo Trial and Beyond* (Cambridge: Polity Press, 1992) p.67.

<sup>89</sup> Bernard, *supra* n.70, p.10.



Given that the category of crimes against peace was not established by the time of the two IMTs, there is no point examining whether the definitions given comport with existing international law. Suffice to say that the formulation given to them was very vague, and open to “interested interpretation”.<sup>90</sup> Only a small amount of help in determining the parameters of the offence are derivable from the judgments of the tribunals,<sup>91</sup> leaving the crime a vague one, with all the issues of legitimacy that entailed.

After the two IMTs, the position in relation to aggression remained controversial. After the Nuremberg IMT the General Assembly promulgated Resolution 95, which “[a]ffirms the principles of international law Recognised by the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal”.<sup>92</sup> There was some debate at the time about whether this amounted to an acceptance that the Nuremberg law was now customary.<sup>93</sup> It is almost universally accepted now that most of the London Charter represents customary international law,<sup>94</sup> and it is difficult now to find a scholar or State who denies the customary nature of the Nuremberg Charter.<sup>95</sup> If any clarification on the Nuremberg IMT’s Charter were required, both the Secretary-General and the ICTY have asserted the

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<sup>90</sup> Pal, *supra* n.70 p.233. See L. Varadarajan, “From Tokyo to the Hague: A Reassessment of Radabinodh Pal’s Dissenting Opinion at the Tokyo Trials on its Golden Jubilee” (1998) 38 *Indian J.I.L.* 233 p.236; L. Kopelman, “Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial” (1991) 23 *N.Y.U.J.I.L. & Politics* 373, pp. 378, 431.

<sup>91</sup> See Lippman, *supra* n.37, p.31.

<sup>92</sup> G.A. Resolution 95 (I), UN Doc. A/64/Add.1.

<sup>93</sup> H. Ehard said Resolution 95 was only a suggestion *de lege ferenda*, *supra* n.57, p.242. It is difficult to square this with the language of Resolution 95.

<sup>94</sup> See M. Lippman, *supra* n.37, p.48; M.C. Bassiouni, “The Nuremberg Legacy” in M.C. Bassiouni (ed.) *International Criminal Law Vol. III: Enforcement* (New York: Transnational, 2<sup>nd</sup> ed. 1999) 195, p.207; I. Brownlie, *International Law and the Use of Force* (Oxford: OUP, 1963) pp.191,193, cites the large number of official statements and items of correspondence accepting this. To these of course, we must add all those who considered the London Charter to be declaratory of customary international law prior to the Nuremberg Trial. In 1963 the Lord Chancellor in the UK told Parliament that the UK believed the Nuremberg Principles “are generally accepted among States and have the status of customary international law” 253 Hansard HL, col. 831 12 December 1963. For other cases at least implicitly accepting the customary nature of the London Charter, *Federation Nationale des Deportes et Internes Resistants et Patriots v Barbie* (1984) 78 *I.L.R.* 125, p.131-133; *Public Prosecutor v Menten* (1997) 79 *I.L.R.* 331, p.344 (which uses the Charter as precedent); *Glaeser* (1976) 74 *I.L.R.* 700, p.702-703; *Public Prosecutor v Leopold L* (1967) 47 *I.L.R.* 464; *U.S. v Mitchell* 386 US 972, pp.973-974; *Kadic v Karadzic* (1994) 100 *I.L.R.* 136, p.154; *In re Extradition of Demjanjuk* 612 F. Supp. 544, 555.

<sup>95</sup> Two of those who could be considered possible rejectionists in this regard are Schwarzenberger (and then only in 1968), *supra* n.57, p.498-499, and A.P. Rubin, *Ethics and Authority in International Law* (Cambridge: CUP, 1997) pp.xiii-xiv. Both of these though, are wider in their critique, denying that international criminal law actually exists, see Schwarzenberger, “The Problem of an International Criminal Law” (1950) 3 *C.L.P.* 262; Rubin *ibid.* pp.xiv-xv. Another very notable possible “rejectionist” was H. Kelsen, “Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?” (1947) 1 *I.L.Q.* 153. His views, coming so soon after the trial appear premature, and since have been shown to be so.

customary nature of the Nuremberg Charter.<sup>96</sup> Additional support in relation to aggression may be derived from General Assembly Resolution 3314, which reaffirmed individual criminal responsibility for initiating wars of aggression.<sup>97</sup>

Nevertheless, neither the ICTY or ICTR Statutes contained a provision granting them jurisdiction over aggression. This is understandable for the ICTR, given that the conflict was essentially a civil war, and the prohibition of aggression is addressed to inter-State force.<sup>98</sup> This does not explain the absence of any provision in the ICTY Statute. There has been little comment on this matter, despite (or perhaps because of) the controversial question of the responsibility for the commencement of the Yugoslav wars of dissolution.<sup>99</sup> It was not mentioned in any of the State suggestions, or the Secretary-General's report. It is probable that given the contentious nature of the offence, the fact that the Security Council Resolutions leading up to Resolution 808 concentrated on the conduct of the war, not the causes, and its absence from State proposals for the ICTY Statute, led the Secretary-General to exclude it from consideration.

The controversy over the inclusion of aggression in international criminal law was clearly manifested in the negotiations leading up to the Rome Statute. The inclusion of the crime, and its definition proved exceptionally controversial.<sup>100</sup> In the *ad hoc* Committee, various definitions were proposed, but some States quite simply did not want

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<sup>96</sup> S-G report *supra* n.46, para 34; *Prosecutor v Tadic*, Opinion and Judgment, 7 May 1997, IT-94-1-T, para 622.

<sup>97</sup> GA Res 3314, UN Doc A/9631, Article 5(2). This is an answer to C. Tomuschat's doubts about the customary status of aggression, "Crimes Against the Peace and Security of Mankind and the Recalcitrant 3<sup>rd</sup> State" in Dinstein & Tabory *supra* n.61, 41, p.54.

<sup>98</sup> H. McCoubrey & N.D. White, *International Law and Armed Conflict* (Aldershot: Dartmouth, 1992) pp.39-51.

<sup>99</sup> The only notable mentions of it in the literature are a lamentation of its non inclusion by Howard Levie, "The Statute of the International Tribunal for Former Yugoslavia: A Comparison With the Past and a Look at the Future" (1995) 21 *Syracuse J.I.L. & Commerce* 1, p.7, O'Brien's assertion that "the Tribunal is aimed at bad soldiers, not bad sides", J. O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia" (1993) 77 *A.J.I.L.* 639, p. 659 and Joyner's comment that it would be difficult to obtain evidence of such crimes (C.C. Joyner, "Strengthening Enforcement of International Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia" (1995) 6 *Duke J.C. & I.L.* 79, p.86).

<sup>100</sup> As Bassiouni states, both the inclusion, and definition of aggression are political issues. M.C. Bassiouni, "Observations Concerning the 1997-8 Preparatory Committee's Work" in M.C. Bassiouni (ed.) *The International Criminal Court: Observations and Issues Before the 1997-8 Preparatory Committee; and Administrative and Financial Implications* (Chicago: Eres, 1997) 5, p.24. In the NGO community, the inclusion of aggression was one of the few issues on which the membership of the US Branch of the ILA was split, see L. Sadat-Wexler, "Introduction" in Bassiouni (ed.), *ibid.* 163, p.166. See generally, A. Carpenter, "The International Criminal Court and the Crime of Aggression" (1995) 64 *Nordic J.I.L.* 223. For discussion of the background to, and



the crime included, whatever the definition<sup>101</sup> Similar arguments relating to the inclusion and definition of aggression, along with the putative role of the Security Council plagued the PREPCOM,<sup>102</sup> and by the Rome Conference the outlook for its inclusion looked bleak.<sup>103</sup> That said, although the same issues arose again in Rome there was strong support for the inclusion of aggression,<sup>104</sup> but this was by no means universal, and those seeking its exclusion had a strong legal argument; the absence of a readily available, broadly acceptable definition.<sup>105</sup> The serious efforts by countries supporting inclusion to get a definition eventually failed,<sup>106</sup> and by the final week of the conference it looked as if aggression would not be included.<sup>107</sup> Jurisdiction over aggression was reincarnated (albeit only into a form of half-life) in the final package given at the end of the conference.

The Rome Statute gives the ICC jurisdiction over the crime of aggression.<sup>108</sup> However, the ICC is not to assert jurisdiction over the crime unless and until a definition is included by way of amendment to the Statute.<sup>109</sup> This definition will probably have to ensure the Security Council is involved in the determination of an act of aggression (itself a problematic and contentious issue).<sup>110</sup> The controversy over its inclusion has still not

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debates in, the Rome conference, see H. von Hebel & D. Robinson, "Crimes Within the Jurisdiction of the Court" in R.S. Lee (ed.), *The International Criminal Court* (The Hague: Kluwer, 1999) 79, pp.81-85.

<sup>101</sup> Report of the Preparatory Committee in the Establishment of a Permanent International Criminal Court UN GAOR Supp 22 A/51/22 Vol II p.58.

<sup>102</sup> See C.K. Hall "The Third and Fourth Sessions of the Preparatory Committee for an International Criminal Court" (1998) 92 *A.J.I.L.* 124, p.128; C.K. Hall, "The Sixth Session of the Preparatory Committee for an International Criminal Court" (1998) 92 *A.J.I.L.* 548, p.551; A Zimmerman "The Creation of a Permanent International Criminal Court" (1998) 2 *Max Planck Y.B.U.N.L.* 169, pp.198-204. A. Zimmermann in O. Triffterer, *The Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999) gives details of PREPCOM at pp.23-24, detailing attempts based around GA Resolution 3314 UN Doc. A/9631, and the German attempts to draft a new definition.

<sup>103</sup> M. Arsanjani, "The Rome Statute for the International Criminal Court" (1999) 63 *A.J.I.L.* 22, p.29.

<sup>104</sup> *Ibid.* p.30.

<sup>105</sup> The US was against inclusion, and its elements of crimes proposals did not include it.

<sup>106</sup> For these efforts see A/CONF.183/C.1/L.37, L.38, L.39 (these two being exceptionally wide (see Zimmerman, *supra* n.102, p.25)), L.56.

<sup>107</sup> L.59, the second Bureau Proposal gave a one day deadline for agreement on a definition, which was (as the Bureau knew) entirely unrealistic. This proposal was really a pretext to justify dropping the crime.

<sup>108</sup> Rome Statute Article 5(1)(d).

<sup>109</sup> Rome Statute Article 5(2). By virtue of Articles 121 and 123, the Statute can only be amended after 7 years of the Rome Statute being in force. In addition, any amendment (which must be passed by at least 2/3 of the State Parties (Article 121(3)) will not come into force until 7/8 of the State Parties have ratified it (Article 121(4)). Any of the Remaining 1/8 may opt out of it for both its territory *and* its nationals (Article 121(5)). D. Sarooshi, "The Rome Statute for an International Criminal Court" (1999) 48 *I.C.L.Q.* 387, p.401 notes this means any State not liking the definition need not accept it.

<sup>110</sup> GA Resolution 3314, UN Doc. A/9631, a non binding aid for the Security Council took over 20 years to draft, and is notoriously vague. See J. Stone, "Hopes and Loopholes in the 1974 Definition of Aggression" (1977) 71 *A.J.I.L.* 224.

abated,<sup>111</sup> and the Statute has a high threshold for alteration,<sup>112</sup> so it is unlikely that a definition will be forthcoming in the near future. The crime of aggression is (as has been shown) a very controversial area, not least as although it is generally accepted as customary, no definition of the offence has received broad support. This is problematic, but instructive. For Nuremberg and Tokyo IMTs, the drafters were happy enough (in the end) to enact it, without precedent or definition, in the IMTs' Charters,<sup>113</sup> while in the Rome Statute, even though its customary nature was far more certain, a definition was considered central. No State would have allowed the crime into the Rome Statute and left the Court to determine its parameters, which is precisely what the IMTs creators did for their two progeny.<sup>114</sup>

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## CRIMES AGAINST HUMANITY

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The first time crimes against humanity were made expressly subject to the jurisdiction of an international criminal tribunal was in the Nuremberg Charter, Article 6(c) of which criminalised “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime under the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”<sup>115</sup>

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<sup>111</sup> Scheffer, for example asserts it should have been removed, *supra* n.53, p.21, Cassese, on the other hand welcomes it cautiously, A. Cassese, “The Rome Statute for an International Criminal Court: Some Preliminary Reflections” (1999) 10 *E.J.I.L.* 144 pp.146-148.

<sup>112</sup> Zimmerman, *supra* n.102, p.26, *ibid.* p.23 he asserts that although it is *de jure* included in the Statute, it is *de facto* excluded, its mention being a sweetener for the package for some States.

<sup>113</sup> Both of which could not be used against their authors.

<sup>114</sup> It is sad to note that at least one of those powers (the US) was probably the most negative about the inclusion of aggression, and while insisting on detailed definitions of all crimes, made no effort to assist in achieving such a definition for aggression.

<sup>115</sup> On crimes against humanity generally, see M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, *supra* n.4; M. Lippman, “Crimes Against Humanity” (1997) 17 *B.C.T.W.L.J.* 171; E. Schwelb, “Crimes Against Humanity” (1946) 23 *B.Y.B.I.L.* 178; Y. Dinstein, “Crimes Against Humanity” in J. Makarczck (ed.), *supra* n.8, 891; R.S. Clark, “Crimes Against Humanity at Nuremberg” in Ginsburgs & Kudriavtsev, *supra* n.177; Ratner & Abrams, *supra* n.4, chapter 3; Robinson, *supra* n.54, J. Rikhof, “Crimes Against Humanity, Customary International Law and the International Tribunals for Bosnia and Rwanda” (1996) 6 *N.J.C.L.* 233;



Precedents for crimes against humanity are thin on the ground before the 20<sup>th</sup> Century. There have been claims that the *von Hagenbach* trial provides a precedent here,<sup>116</sup> a rejection of that view appears above (p.22). The first time an analogous concept was used in an international document was in the 1907 Hague Convention IV,<sup>117</sup> in the famous “Martens clause”. This clause, which can be found in the preamble reads, “in cases not included in the Regulations adopted by them the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the laws of humanity, and the dictates of the public conscience.” The possibility of implying criminal responsibility exists from this clause to a small degree, but has been subject to serious criticism.<sup>118</sup> There are two primary arguments against such an interpretation. The first is that the Convention itself does not expressly state that there is criminal responsibility for violations of it. As seen above, this is not determinative. The other is that although there has traditionally been penal liability for violations of the laws of armed conflict, including those parts of it in the Hague Convention, this does not apply to the part of the Convention dealing with the laws of humanity. After all, they are only mentioned once, in the preamble.

These arguments seem not to have concerned many of the Allied side in the First World War. In 1915 the Russian, French and British governments protested to Turkey that Turkish massacres of Armenians amounted to “crimes of Turkey against humanity”.<sup>119</sup> McCormack states that this was “more a political reaction... than the first step in a clearly articulated process for the punishment of alleged perpetrators according

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M.C. Bassiouni, “Crimes Against Humanity” in Bassiouni (ed.), *supra* n.57, 521; O. Swaak-Goldman, “Crimes Against Humanity” in McDonald & Swaak-Goldman (eds.), *supra* n. 141; WJ. Fenrick, “Should Crimes Against Humanity Replace War Crimes?” (1999) 37 *C.J.T.L.* 767; B. van Schaack, “The Definition of Crimes Against Humanity: Resolving the Incoherence” (1999) 37 *C.J.T.L.* 787; R. Dixon, C. Hall & M. Boot, “Article 8” in Triffterer (ed.), *supra* n.102, 117.

<sup>116</sup> Schwarzenberger, *supra* n.57, p.466.

<sup>117</sup> 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, (1910) UKTS 9 Cd. 5030.

<sup>118</sup> M.C. Bassiouni “International Law and the Holocaust” (1979) 9 *Cal. W.I.L.J.* 209, p.210. See now the excellent discussion of the Martens Clause by A. Cassese, “The Martens Clause: Half a Loaf, or Merely Pie in the Sky?” (2000) 11 *E.J.I.L.* 187.

<sup>119</sup> W.G. Sharp to Bryan, (28 May 1915), Foreign Relations of the United States 1915: The World War. On this generally, see V. Dadrian, “Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Ramifications” (1989) 14 *Yale J.I.L.* 221.

to established legal principles”.<sup>120</sup> He may be correct, but post-War events saw the beginnings of the crystallisation of the law. The 1919 Commission reported that “[a]ll persons belonging to enemy countries... who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.”.<sup>121</sup> The US members of the Commission dissented on this part, saying that the laws of humanity were too vague to create a judicially enforceable standard.<sup>122</sup> Much has been made of their dissent, but theirs was a dissenting opinion, and their views have not escaped criticism. If favour of the dissenters, though, it must be said that these were, effectively undefined ideas.<sup>123</sup> The possibility of trial for these was expressly contemplated in the Treaty of Sèvres<sup>124</sup> It was never ratified. Its successor, the Treaty of Lausanne,<sup>125</sup> did not contain a similar provision on punishment. It did contain a declaration of amnesty. This may support the idea of penal responsibility in that if there is no crime there is no reason for amnesty. Overall, it seems that there were the beginnings of a rule of criminalisation of such offences, although no definition or precedent existed and there were dissenting voices. Perhaps the only limit that can be determined on the definition of crimes against humanity is from their context. So far as the Hague Convention and the Armenian correspondence both related to wartime acts, peacetime acts were still in the preserve of State sovereignty.<sup>126</sup>

In the London conference, there was great debate on crimes against humanity amongst the delegates. Although little dissent was recorded on their inclusion, their definition was controversial.<sup>127</sup> There was disquiet about the applicability of such prohibitions in peacetime, which were mollified by Jackson’s inclusion of a limit upon

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<sup>120</sup> T.L.H. McCormack, “From Sun Tzu, to the 6<sup>th</sup> Committee: The Evolution of an International Criminal Law Regime” in McCormack & Simpson, *supra* n.19, 31, p.45. See also Swaak-Goldman, *supra* n.115, p.146, referring to its use there “in its non technical sense”.

<sup>121</sup> *Supra* n.63, p.438.

<sup>122</sup> *Ibid.*, pp.451-452.

<sup>123</sup> See Lord Wright, “War Crimes Under International Law” (1946) 62 *L.Q.R.* 40, p.48.

<sup>124</sup> TS No. 11 (1920).

<sup>125</sup> (1923) 8 LNTS 11.

<sup>126</sup> See P. Malanczuk, *Akehurst’s Modern Introduction to International Law* (London: Routledge, 7<sup>th</sup> ed. 1997) pp.354-5. In relation to wartime acts, there is a possibility that there was an arguable claim for customary status, in WWII the Germans issued various books documenting “violations of the laws of war and humanity”. See A. de Zayas, *The Wehrmacht War Crimes Bureau 1939-1945* (Lincoln: University of Nebraska Press, 1989) p.186.



them to those linked with other crimes in the jurisdiction of the court (war crimes or crimes against peace).<sup>128</sup> As war crimes law applies only during times of armed conflict, and aggressive war was only retroactively criminal, the idea that the proposal overcame the questions of *ex post facto* creation of offences is unconvincing, and the argument served more to placate fears of some Allied nations about the international criminality of their own actions in relation to domestic minorities.<sup>129</sup> Nuremberg relied heavily on the link to wartime, or crimes against peace, not accepting that all pre-1939 acts could be classified as crimes against humanity.<sup>130</sup> Although the Nuremberg IMT convicted defendants for actions before (but related to) the war,<sup>131</sup> it clearly had some doubts about this aspect of the crimes against humanity charge, at least insofar as it did not overlap with war crimes.<sup>132</sup>

Judges in the early cases after the War were ready to accept that crimes against humanity (as defined at Nuremberg) were a pre-existing category of crime,<sup>133</sup> but in recent years, opinion has been split about the criminality of crimes against humanity by 1945. The Australian Court in *DPP v Polyukhovic* split 4-3 on the matter, coming out in favour of the existence of these crimes before the war.<sup>134</sup> The Canadian Supreme Court in *R v Finta* found, by the same majority, that crimes against humanity were retroactively criminalised,<sup>135</sup> and in the UK, the Hetherington-Chalmers Report said that it was not certain that crimes against humanity were illegal at the time.<sup>136</sup> It is interesting that the *Tadic* judgment effectively adopted the position that crimes against humanity were retroactive in 1945.<sup>137</sup> Academic opinion is split on the pre-1945 situation,<sup>138</sup> but due to

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<sup>127</sup> See Lippman, (1997) *supra* n.115, pp.178-186.

<sup>128</sup> See *Report of Robert H Jackson*, *supra* n.38, p.384; Lippman, *supra* n.37, p.24.

<sup>129</sup> Jackson, *ibid.*, p.381. Although the UK and France may have had concerns about their actions in their colonies and Stalin's internal repression would clearly fall foul of the prohibition, the US also had reason to fear their formulation. It was, of course, still a segregationist State at the time.

<sup>130</sup> IMT Judgment, *supra* n.4, p.249.

<sup>131</sup> See Lippman (1997), *supra* n.115 p.270; B.V.A. Röling, "The Law of War and National Jurisdiction" (1960) 100 *R.d.C.* 329, p.347 claims this was only the case for Streicher.

<sup>132</sup> Lippman, *supra* n.37, p.34 states that they mixed war crimes and crimes against humanity.

<sup>133</sup> *US v Ohlendorf* 4 T.W.C. 411, p.499; *in re Rauter* (1948) 16 A.D. 553 said the offences were pre-existing.

<sup>134</sup> *DPP v Polyukhovic* (1991) 101 ALR 545, Toohey J (majority) pp.661-662, Brennan J (minority) p.597.

<sup>135</sup> *R v Finta* 112 DLR (4th) 513, Cory J (majority) p.638, La Forest J (minority) p.556.

<sup>136</sup> T. Hetherington & W. Chalmers, *Report of the War Crimes Inquiry* (London: HMSO, 1989) p.62.

<sup>137</sup> *Tadic* *supra* n.96, para 618.

Resolution 95(1) and the various cases since the war it is now accepted that crimes against humanity are criminal under contemporary customary international law.<sup>139</sup>

The definition of crimes against humanity in the Tokyo Charter appeared, on its face, to be almost identical to that in the London Charter. Indeed, it was adopted as such initially.<sup>140</sup> Then, three days before the trial opened, the Prosecution decided to alter the Charter,<sup>141</sup> removing the words “against any civilian population”. This was done purely so the prosecution could assert that all killings in an illegal war were themselves illegal. They did this by charging, in Counts 39-43 and 45-52 of the indictment, the defendants with crimes against humanity for the unlawful killing of soldiers. Frankly, this action was legally perverse. It cuts directly across the entire basis of international humanitarian law, which is based upon the idea of privileged belligerency.<sup>142</sup> The position in international law is correctly asserted by Bothe to be “acts of homicide performed in accordance with the laws of armed conflict do not constitute homicide in the legal sense, or constitute justifiable homicide”.<sup>143</sup> If the converse were the case, there could effectively be no international humanitarian law, as it would only be relevant to one side, the aggressor would have no reason to comply with the laws of war, as their actions would be illegal anyway. As *US v List* correctly determined, identification of one party as an aggressor or otherwise is irrelevant for humanitarian law.<sup>144</sup> The Tokyo IMT rejected these charges,

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<sup>138</sup> See Akehurst, *supra* n.126; Schwarzenberger, *supra* n.57, pp.498-499; F. Morrison, “The Significance of Nuremberg for Modern International Law” (1995) 149 *Military L.R.* 207, pp.210-211; L. Gross, “The Prosecution of War Criminals: The Nuremberg Trial” in L. Gross, *Selected Essays on International Law and Organization* (New York: Transnational, 1984) p.133. All the above are dubious about their status prior to 1945; Lippman, *supra* n.37, p.39 inclines to this view; Schwelb, *supra* n.115, p.178 refers to them as “novel”, see also Dinstein, *supra* n.115, p.891 “only in 1945 was the terminology embraced by positive international law”. *Contra* Bassiouni, *supra* n.4, chapter 4; Woetzel, *supra* n.57, pp.172-181; Wright, *supra* n.57, pp.61-62; R.S. Clark, *supra* n.115, 177; A. Cassese, *Violence and Law in the Modern Age* (Cambridge: Polity, 1984) p.108; Kochavi, *supra* n.36, Chapter 5 gives a very interesting survey of governmental positions at the time.

<sup>139</sup> *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72, para 141; Secretary-General’s Report, *supra* n.46, para 47; The only person who continued to reject crimes against humanity as customary international law was Schwarzenberger, *ibid*.

<sup>140</sup> Article 5(c). the only (original) difference was the removal of the religious ground of persecution, probably as there was no evidence of such persecutions in the Pacific sphere (See Bassiouni, *supra* n.4 p.33).

<sup>141</sup> See B.V.A. Röling & A Cassese, *The Tokyo Trial and Beyond* (Cambridge: Polity Press, 1992) pp.56-57.

<sup>142</sup> In the UK, for a charge of murder, the victim must be killed “under the King’s peace”, this excludes enemy combatants killed in battle, *R v Page* [1953] 2 All ER 1355.

<sup>143</sup> M. Bothe, “War Crimes in Non International Armed Conflict” in Dinstein & Tabor (eds.), *supra* n.61, 293 p.295. See also Fenrick *supra* n.103, p.783.

<sup>144</sup> 15 A.D. 532. On this point generally see C. Greenwood, “The Relationship Between the *Ius ad Bellum* and *Ius in Bello* (1983) 9 *Rev.I.Studies* 221, especially p.229.



albeit rather half-heartedly, merely claiming that they were subsumed under the crimes against peace charge.<sup>145</sup> Their reasoning is a matter of concern, for it would effectively justify all crimes against humanity by the non aggressor,<sup>146</sup> and did not deal with the thesis straight on. On the basis of its theory the Tokyo IMT left itself able to convict on these charges if a defendant was acquitted of a crime against peace. This aspect of the Charter was entirely unjustifiable, and its late addition does nothing but underscore the Prosecution's subjection of the definitions of law to its strategy in Tokyo. This aspect was never adopted by any other body, which is a good thing.

The problem with crimes against humanity post-Nuremberg is not their basis in customary international law, but the contours of their definition. The Nuremberg (and Tokyo) Charter and judgment left many issues uncertain. To some these matters were of such a fundamental nature as to require a multilateral convention to settle them.<sup>147</sup> As the controversy in the three tribunals since 1990 has related to the scope of crimes against humanity, it is advisable to clarify the requirements, both accepted and controversial in the definitions of crimes against humanity, prior to the creation of these tribunals. Reference will be made to judgments of the ICTY & ICTR here, as they discuss custom, but it must be remembered that these clarifications were not available prior to the creation of the ICTY, or ICTR (although many were prior to the drafting of the Rome Statute). The various State proposals for the definition of crimes against humanity preceding the Secretary-General's report on the ICTY betray a lack of consensus on the requirements for liability,<sup>148</sup> but from these criteria choices were made about inclusions in the ICTY Statute, and those choices that were made may give us insights into the attitudes of the actors in the field.

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<sup>145</sup> Tokyo IMT Judgment, *supra* n.70, Vol 20: Judgment, pp.48,452-48,453; Judge Jaranilla dissented on this, *supra* n.70, pp.9-10. Röling & Cassese, *supra* n.141, p.57 claim that the Tokyo IMT did reject the charges. Levie, though, asserts that they came perilously close to accepting them, H. Levie, *Terrorism in War: The Law of War Crimes* (New York: Oceana, 1992) p.147.

<sup>146</sup> Jaranilla, *ibid.*

<sup>147</sup> M.C. Bassiouni, "Crimes Against Humanity: The Need for a Specialized Convention" (1994) 31 C.J.T.L. 457.

<sup>148</sup> V. Morris & M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (New York: Transnational, 1995) p.77.

## LINK TO ARMED CONFLICT

The Nuremberg definition, requiring a link to war crimes or crimes against peace, has led to questions about whether or not there is a necessary link to armed conflict, or if the limit in Nuremberg was jurisdictional rather than substantive. This has been controversial from the start; at least one of the Tokyo judges thought that the limit was jurisdictional alone.<sup>149</sup> One problem with this reasoning is that Jackson's justification of the charge implies that the nexus was the essence of the definition of the offence. Since then, though the trend has strongly been against seeing the link as necessary.<sup>150</sup> However, prior to the *Tadic* ruling,<sup>151</sup> there had been no authoritative pronouncement that the requirement was not part of customary international law for crimes against humanity.

## WIDESPREAD/ SYSTEMATIC NATURE

It is generally accepted that, from the Nuremberg definition requiring "against a civilian population", crimes against humanity must be large scale ("mass"), and/or systematic. This means that that isolated acts are not crimes against humanity.<sup>152</sup> The problem is that the law, as it stood in the early 1990s, was not clear as to whether these requirements were conjunctive or disjunctive.<sup>153</sup> The *Tadic* Judgment made it clear that customary law requires them in the alternative.<sup>154</sup> In the PREPCOM and at Rome

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<sup>149</sup> Röling & Cassese, *supra* n.141, p.56. Röling's view was that the requirement of link to an offence in an armed conflict was purely a restriction on the courts' jurisdiction, rather than it being a part of the definition of a crime against humanity.

<sup>150</sup> CCL10 did not have it; the Genocide Convention, which deals with a particularly egregious type of crime against humanity states, in Article I that genocide is a crime in time of peace or war. The Apartheid Convention & 1968 Convention on the Non Applicability of Statutes of Limitation to War Crimes and Crimes Against Humanity, accept peacetime application of these crimes, as do the ILC Draft Codes of Crimes of 1954, 1996, Ratner & Abrams, *supra* n.4, p.56 assert that there is almost no-one who would now assert the nexus. At PREPCOM, however, certain States did (Russia and China (Zimmerman, *supra* n.102, p.177, Report, *supra* n.102, 21-23.) At Rome, those asserting the requirement of a nexus were in the minority (Robinson, *supra* n.54, pp.45-46); von Hebel & Robinson, *supra* n.100, pp.92-93.

<sup>151</sup> *Tadic* AR 72, *supra* n.139, para 141.

<sup>152</sup> As the second *Tadic* appeal made clear, crimes against humanity can be committed for personal motives, but they must be related to a widespread or systematic attack, and the accused knew that the crimes were related to that attack, *Prosecutor v Tadic*, Judgment, 15 July 1999, IT-94-1-A, para 271.

<sup>153</sup> See Ratner & Abrams, *supra* n.4, pp.57-60.

<sup>154</sup> *Tadic* Judgment (Trial Chamber), *supra* n.96, paras 645-646.



though, there were calls for a conjunctive definition.<sup>155</sup> It is perhaps relevant to mention that it is possible (and perhaps better) to view these requirements a different way, that they are actually evidential matters for the proof of a policy requirement.

## POLICY

There is strong support for the idea that there is a definitional requirement that the acts are committed pursuant to a policy. It is not certain though, whether this is not really the underlying requirement for which the mass/systematic requirements are actually merely the forms of proof.<sup>156</sup> More important though are suggestions that the only entities capable of having such a policy (or systematic element) are States. This would exclude acts of individuals, but also those sub-State entities which have the requisite *de facto* power to muster forces etc. sufficient to commit such offences. This includes sub-State belligerents in civil wars, which could create a worrying asymmetry in such a conflict, where government officials could commit crimes against humanity, but the rebels could not.<sup>157</sup> *Tadic* was explicit that non State entities are capable of committing such acts.<sup>158</sup>

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<sup>155</sup> Report, *supra* n.101, II 21-23; Hall, *supra* n.102, p.127, Zimmerman, *supra* n.102, pp.173-176. *Prosecutor v Nikolic*, Rule 61, 20 October 1995, IT-94-2-R-61 para 26 "Crimes against humanity must, to a certain extent, be organised and systematic". At Rome there were still deliberations about this, Arsanjani, *supra* n.103, p.31; von Hebel & Robinson, *supra* n.100, pp.94-95.

<sup>156</sup> *Tadic*, *supra* n.96, para 653 said that a policy could be inferred from the widespread or systematic nature of offences, this supports the view that the widespread/systematic criteria are actually evidential methods of proving the policy requirement. For cases insisting on the requirement see *US v Alstötter* (1947) 14 A.D. 278, p.284, *US v Flick* 9 L.R.T.W.C. 1, p.40.

<sup>157</sup> For those accepting that non-State entities may commit crimes against humanity, see, *Sivakumar v Canada* [1994] 1 F.C. 433, p.444. *Pohyukhovic*, *supra* n.134, p.617, The ILC dropped the requirement in 1987 ((1987) YB.I.L.C. vol. 2, part 2, p.14) . It was absent from both Article 21 of the 1991 Draft code (Report of the ILC on the Work of its 43<sup>rd</sup> Session, p.266) and Article 18 ILC Draft Code of Offences 1996; see Zimmerman, *supra* n.102, p.74.

<sup>158</sup> *Tadic*, *supra* n.96, para 654.

## MENS REA

It is generally accepted that for a crime against humanity to be committed, the perpetrator must have knowledge of the widespread or systematic attack,<sup>159</sup> but this is not the end of the matter in relation to *mens rea*.

Despite the Nuremberg IMT Charter separating off two types of crimes against humanity, those of the “murder” type and those of the “persecution type”,<sup>160</sup> there is some support for the idea that crimes against humanity require an intent on the part of the perpetrator to discriminate against the group to which the victims belong.<sup>161</sup> The *Tadic* case stated that customary international law did not require such a motive.<sup>162</sup> This did not prevent some States in PREPCOM expressing a preference for the inclusion of such a requirement,<sup>163</sup> and some States had included the requirement in their suggestions for the ICTY Statute.<sup>164</sup>

## ACTUS REUS/ THE ENUMERATED ACTS

This is perhaps the least controversial part. The classic definition, that of the Nuremberg IMT Charter, in addition to the named grounds, included a catch all, of “other inhumane acts”. This entered customary international law with the Nuremberg IMT Charter, and thus adding acts, so long as they are clearly inhumane can be seen in most cases as a mere clarification of this provision. Because of the possibility of further inhumane acts coming to light is always present, there are arguments in favour of the

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<sup>159</sup> Robinson, *supra* n.54, p.52. *Tadic* AR 72, *supra* n.139, paras 656-659.

<sup>160</sup> Ratner & Abrams, *supra* n.4, pp.60-64.

<sup>161</sup> See Ratner & Abrams, *ibid.*, pp.60-64, Report of the ILC, 1954 Article 2(11) pp.151-152; ICTR Statute, Article 3; The CSCE, US and Netherlands suggestions relating to the ICTY Statute contained the requirements, none of the others did (see the summary in Morris & Scharf, *supra* n.148, pp.380-383). There is also controversy about the grounds upon which this can happen.

<sup>162</sup> *Tadic* Judgment, *supra* n.96, paras 651-652; This was upheld on appeal, which, however overturned the Trial Chamber finding that the requirement had been included in the ICTY Statute, *Prosecutor v Tadic* *supra* n.152. paras 273-305.

<sup>163</sup> C.K. Hall “The First Two Sessions of the Preparatory Committee for an International Criminal Court” (1997) 91 *A.J.I.L.* 1 77, p.180.



approach taken in the London Charter, but it cannot be ignored that it is a vague formulation, for which a price may be paid in legitimacy. The price, of course, may be worth paying to ensure that innovative methods of committing mass/systematic atrocities are criminal.

## THE DEFINITIONS

The definition in the ICTY Statute is relatively short, providing that “[t]he International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder, (b) extermination, (c) enslavement, (d) deportation, (e) imprisonment, (f) torture, (g) rape, (h) persecutions on political, racial and religious grounds, (i) other inhumane acts.”<sup>165</sup>

Certain things are clear from the above definition. The first is that there is a limit to crimes committed in armed conflict. The requirement was put in, according to Morris and Scharf, because the Security Council had taken jurisdiction over Yugoslavia as an armed conflict, not that the Secretary-General considered this to be one of the criteria for a crime against humanity.<sup>166</sup> It must be noted though that this amounts to a clear limitation on the ICTY definition.<sup>167</sup> In relation to the requirements for the enumerated acts to be considered crimes against humanity the Statute is not very helpful, resembling, as it does, the delphic Nuremberg definition.

One question revolves around what is meant by “directed against a civilian population.” It may be possible to draw some assistance from the Secretary-General’s report containing the ICTY Statute. In paragraph 48 of his report, he said “[c]rimes

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<sup>164</sup> See *infra*. pp.234.

<sup>165</sup> ICTY Statute Article 5.

<sup>166</sup> Morris & Scharf, *supra* n.148, p.79-80; See also L. Johnson, “The International Tribunal for Rwanda” (1996) 67 *Rev.I. de Dr. Penal* 211, p219. The Secretary General’s report bears this out, as it asserts (*supra* n.46, para 47) that crimes against humanity are applicable irrespective of the existence of an armed conflict.

<sup>167</sup> See Morris & Scharf, *supra* n.148, pp.82-83.

against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds... such inhumane acts have taken the form of so-called 'ethnic cleansing' and widespread and systematic rape and other forms of sexual assault, including enforced prostitution".

The Secretary-General's comments could be seen as answering various questions. They relate to the inclusion of persecution as a criterion for all crimes against humanity, and (by omission) accepting that entities other than States can be the bodies creating a policy. There are problems with his commentary. His comments are inconsistent with the language of the Article, which, as shown in relation to the nexus does not reflect the language above. Secondly they are inconsistent within themselves. For example, in the first sentence, he uses "widespread or systematic", but with a persecution requirement. Then in the second sentence, he refers to rape as being committed in a "widespread and systematic" way, without mentioning the persecution element. In addition, accepting the persecution requirement would make a nonsense of the crime against humanity in Article 5(h) which expressly has the crime of persecution and lists the grounds upon which the persecution must occur separately from the other acts. It may be that the difficulties involved here meant those drafting the report for the Secretary-General were unhappy with the absence of consensus on the issue of the requirements, and therefore effectively hedged their bets by not putting them into the Statute, but ambiguously placing them in the commentary. Morris and Scharf assert that the reason the commentary and Statute do not conform is that due to the controversy over the criteria of liability for crimes against humanity, the Statute was changed very late on, to conform to Article 6(c) of the London Charter, while the factual part of the Secretary-General's report remained the same.<sup>168</sup> This could be the case, but it would amount to a very serious oversight to have allowed the report go out without checking its congruity with the Statute.

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<sup>168</sup> Morris & Scharf, *supra* n.7 p.199.



On adoption of Resolution 827, the US, French and Russian representatives all mentioned that they interpreted crimes against humanity as requiring a discriminatory intent.<sup>169</sup> Relying on these, the Trial Chamber in the *Tadic* Case controversially interpreted the Statute to require the element of discriminatory *animus* for all crimes against humanity even though it did not agree that the requirement was a part of customary international law.<sup>170</sup> This aspect of the decision has been criticised,<sup>171</sup> and on appeal, the Appeals Chamber spent a great deal of time expressly overturning this part of the Trial Chamber's decision. This brought their interpretation of the ICTY Statute into line with their view (and that of the Trial Chamber) that customary international law does not require a persecutive intent.<sup>172</sup> Perhaps more important than the decision in that case is that the decision was left to the ICTY, as were the decisions on other questions relating to the parameters of liability, e.g. on whether the conditions of widespread/systematic nature were cumulative or disjunctive.

The enumerated acts were uncontroversial. Given that the list in the London Charter was illustrative rather than exclusive, a certain degree of leeway is acceptable in adding to the list of modalities by which crimes against humanity can be committed. The list adds imprisonment, torture and rape.<sup>173</sup> These were present in the Control Council Law 10 definition of crimes against humanity, and it would be all but impossible to deny that these acts were inhumane.<sup>174</sup> As with the London Charter, the list is not closed, therefore the ICTY has been granted the opportunity to add more inhumane acts in practice.<sup>175</sup>

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<sup>169</sup> S/PV. 3217 pp.16,11,45 respectively. The Appeals chamber in *Tadic* *supra* n.152, paras 298-304 discuss the meaning and import of these statements, and rejects the idea that they are controlling here (para 304).

<sup>170</sup> *Tadic*, *supra* n.96, para 652.

<sup>171</sup> C. Greenwood, "The Development of International Humanitarian Law by the International Criminal Tribunal for Yugoslavia" (1998) 2 *Max Planck Y.B.U.N.L.* 97, p.135 supports the decision; Johnson, *supra* n.166, p.219 says this is what the Statute required; whereas Robinson, *supra* n.54, p.46 claims that this finding is crying out for reversal on appeal. This was done.

<sup>172</sup> *Tadic*, *supra* n.96, paras 273-305.

<sup>173</sup> Article 5, See Joyner, *supra* n.99, p.86.

<sup>174</sup> See Morris & Scharf, *supra* n.7, pp.188-190.

<sup>175</sup> K.A. Hochkammer, "The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics and International Law" (1994) 28 *Vanderbilt J.T.L.* 19, p. 162 considers leaving the list open to be problematic, as it is undefined.

Unlike the ICTY Statute Article 5, the ICTR Statute's definition of crimes against humanity makes the answers to various liability questions far more explicit, and correspondingly, limits the powers of the ICTR to disagree with the drafters (who, in this case, were States). The ICTR definition repeats the list of acts in the ICTY Statute, and defines them as amounting to crimes against humanity "when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds".<sup>176</sup> This decides certain issues. The first of these is that it is now clear that there is no required nexus to armed conflict.<sup>177</sup> Although prior to the ICTR Statute the absence of the requirement was almost certainly customary international law, this is a welcome development. The second issue decided is that instead of using the vague "directed at a civilian population" standard, Rwanda requires the acts to be part of a "widespread or systematic attack". This clarifies that they are not conjunctive requirements. Morris and Scharf criticise this as possibly being a higher standard than required in the ICTY.<sup>178</sup> This is unlikely to be the case in practice, given that in *Tadic* neither side argued on the presence of those requirements under the ICTY Statute, but rather on their cumulative or disjunctive nature.<sup>179</sup>

This is not the most important part of the definition. In stark contrast to the ICTY Statute, the ICTR Statute explicitly provides for the requirement of a discriminatory intent. Although some thought this to be a part of the ICTY definition,<sup>180</sup> it is very dubious on international legal grounds, for the reasons given above, and has been roundly criticised.<sup>181</sup> There was no explanation of this addition in the Security Council,<sup>182</sup> and theories have abounded. Meron claims that it was inadvertence on the part of the Security

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<sup>176</sup> ICTR Statute Article 3.

<sup>177</sup> See Meron, "International Criminalization of Internal Atrocities" (1995) 89 *A.J.I.L.* 554, p.557; M.M. Wang, "The International Criminal Tribunal for Rwanda, Opportunities Clarification, Opportunities for Impact" (1995) 27 *Columbia H.R.L.R.* 177, p.216.

<sup>178</sup> Morris & Scharf, *supra* n.148, pp.194-5.

<sup>179</sup> *Tadic* Judgment, *supra* n.96, paras 645-646.

<sup>180</sup> Johnson, *supra* n.166, p.219.

<sup>181</sup> See Morris & Scharf, *supra* n.7, pp.196-199.

<sup>182</sup> Johnson, *supra* n.166, p.219.



Council.<sup>183</sup> This is possible, but given the controversy relating to crimes against humanity before the creation of the ICTY, and the likelihood that the ICTR Statute would be adopted without change, it is perhaps more apposite to look at the identities of the drafters. As the US was intimately involved, it is surely more than coincidental that the requirement was added, as the requirement was in its suggestions to the Secretary-General for the ICTY Statute.<sup>184</sup> Little can be inferred from New Zealand's position on the matter. In relation to the Rwandan government, their interests in avoiding prosecution would certainly be best served by a restricted definition of crimes against humanity, as unlike for genocide, there was a possibility that some of the victorious Rwandan government forces were guilty of crimes against humanity (and war crimes).<sup>185</sup> Indeed Rwanda voted against the Statute partially on the basis that those offences were put into the ICTR Statute.<sup>186</sup> It is not impossible that in negotiations a higher standard was agreed to as the US believed that to be the standard anyway, and Rwanda was concerned about RPF forces being tried before the ICTR.<sup>187</sup>

In Rome, it was generally accepted that crimes against humanity should be included,<sup>188</sup> but almost all the elements were the subject of disagreement.<sup>189</sup> The end result was a compromise between those States seeking a very narrow definition, and those States (and NGOs) working for a broad, effective definition of the crimes. It is perhaps here that some States showed a surprising level of acceptance of a broad definition, although they were by no means unopposed. The final result, as will be seen, is in some ways a positive development,<sup>190</sup> in others, a more conservative provision than customary international law requires.

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<sup>183</sup> Meron, *supra* n.177. p.557.

<sup>184</sup> *Supra* n.168.

<sup>185</sup> Schraga & Zacklin, *supra* n.50, p.503.

<sup>186</sup> See *supra* p.44, n.159.

<sup>187</sup> J. Paust, "Panel Discussion" (1995) 89 *Proc. A.S.I.L.* 311, p.311 asked whether the reason was that States, realising that a permanent international court was more likely, sought to limit the definition more generally.

<sup>188</sup> Zimmerman, *supra* n.102, p.172.

<sup>189</sup> See von Hebel & Robinson, *supra* n.100, pp.98-103.

<sup>190</sup> Not least, in being the first generally drafted definition of this notoriously vague crime. A definition such as this probably provides more Franckian legitimacy than the previous caselaw and doctrine.

The definition in Article 7 of the Rome Statute is as follows:

“[a crime against humanity is] any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender... or other grounds as are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph, or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) the crime of Apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health.”

As can be seen, this definition is significantly clearer than previous formulations. It is clear, for example, that it does not include any nexus to armed conflict. Also there is no mention of any requirement of persecutive intent, except for the crime of persecution. That said, and although the definition appears to adopt the mass or systematic criteria *simpliciter*, there may have been a slight raising of the threshold for crimes against humanity. This is because “attack directed against a civilian population” is defined as “a course of conduct involving the multiple commission of acts... against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such an attack”.<sup>191</sup> As Robinson notes, this amounts to compromise between those

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<sup>191</sup> Article 7(2)(a). One important clarification is that “organizations” other than States are capable of commission of such offences. Less certain is precisely what organisations come under this definition.



wanting the requirements disjunctively and those wanting them cumulatively.<sup>192</sup> It effectively introduces an additional set of requirements, a “course of conduct” and a “policy”. These require further explanation. They come into play in addition to the requirements of widespread nature or systematicity. They are both actually based on those requirements, “course of conduct” being based on the “widespread” criterion, whilst the policy requirement is modelled on the systematicity requirement.

Thus, if a widespread set of acts is pleaded, then the Prosecution must also prove that a policy existed. This is problematic; although the existence of a policy is said by Robinson to have a lower threshold of proof than a systematic act this may well not be the case.<sup>193</sup> If so, it is the introduction of the conjunctive requirement through the back door. If a systematic set of acts is alleged, then the Prosecutor also has to show a course of conduct involving multiple commission of such acts. Robinson asserts that this is an acceptable reading of the jurisprudence here. The weakness in his argument is that it runs against the *Tadic* decision, which said that “if acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts”.<sup>194</sup> The *Tadic* judgment also said, in relation to the requirement that the acts are directed against a civilian population “either a finding of widespreadness... or systematicity ... fulfils this requirement”.<sup>195</sup> It would appear that the threshold is slightly higher, the *Tadic* judgment said that although it is correct that isolated, random acts should not be crimes against humanity; “[e]ven an isolated act can constitute a crime against humanity if it is the product of a political

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<sup>192</sup> Robinson, *supra* n.54, p.47.

<sup>193</sup> *Ibid.*, p.48-50. This may supported by the ICTR, who, in *Akayesu* said that systematic acts require “thoroughly organised and following a regular pattern on the basis of a common plan on the basis of a common policy involving substantial public or private resources” *Prosecutor v Akayesu*, Judgment, 2 September 1998, ICTR-96-4-T, paras 580. See also Robinson, *ibid.*, p.50. He asserts that a policy is more flexible, given that *Tadic* said a policy need not be formalised. Even so, *Tadic* also took the view that systematicity means “that a pattern or methodical plan is evident” (*supra* n.96, para 648), and importantly, that either the widespread or systematic nature of the acts demonstrate a policy to commit them (para 653). Also the ILC commentary to the draft code of 1996 claimed “in a systematic manner mean[s] pursuant to a preconceived plan or policy” Report of the ILC on the work of its Forty-Eighth Session, UN Doc. A/CN.4/L.527/Add.10, p.94, See *Tadic*, *ibid.*, para 648. For a similar argument to this, achieved independently see P. Hwang, “Defining Crimes Against Humanity at the Rome Conference “ (1998) 22 *Fordham I.L.J.* 457. Van Schaack, *supra* n.115, p.845, criticises those who suggest that the requirement is a higher one than a purely disjunctive formula, on the grounds that it is a lower threshold than some requested. This is no answer to the criticism that the formula is narrower than customary international law.

<sup>194</sup> *Tadic*, *ibid.*, para 653.

<sup>195</sup> *Tadic*, *ibid.*, para 648.

system based on terror or persecution”.<sup>196</sup> This is not the case under the Rome Statute. That, in addition to the inclusion of a policy requirement does in fact raise the threshold from that asserted by *Tadic*, the most recent and most authoritative pronouncement on the matter. The Rome approach may not be entirely unsupportable in international law, but it certainly shows a narrower view than could have been the case. It is notable that the US expressed the view that the threshold was relatively high here.<sup>197</sup> If the view is taken that the requirements of widespread or systematic nature are methods of proof of the policy requirement, then it is clear that this aspect of the Rome Statute has raised the threshold. It separates off a concept from its forms of proof, to require a higher level of proof than exists under customary law or the ICTY Statute.

The enumerated acts,<sup>198</sup> on the other hand seem to represent a broadening of coverage, but it must be remembered that these were included against the background of the heightened threshold. It must also be noted that, in contrast to all previous definitions of the crimes, many of the acts which may amount to crimes against humanity are defined in the Statute. The enumerated acts begin by following the well established path of the London and Tokyo Charters, Control Council Law 10 and the two UN Tribunals, mentioning murder, extermination, enslavement and torture.<sup>199</sup> To the well accepted modality of crimes against humanity, of deportation, the Statute adds “or forcible transfer

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<sup>196</sup> *Ibid.* para 649, citing the Report of ILC Special Rapporteur D. Thiam, (1986) *Y.B.I.L.C.* Vol II, UN Doc. A/CN.4/466, para 89. On *Tadic* here, see W.J. Fenrick, “The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia” (1998) 3 *J.A.C.L.* 197, pp.215-219.

<sup>197</sup> Scheffer, *supra* n.53, p.16.

<sup>198</sup> On which see, for pre-Rome discussion, Zimmerman, *supra* n.102, pp.179-186, Hall, *supra* n.102, pp.126-127. For the Rome negotiations and for commentary see Robinson, *supra* n.54, pp.52-56.

<sup>199</sup> Article 7(1)(a)(b)(c)(e). Extermination is said to include “intentional infliction of conditions of life *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population” (based partially on a Cuban suggestion A/CONF.183/C.1/L.30). See generally Hall & Boot, in Triffterer (ed.), *supra* n.115, pp.49-55. Enslavement is said to be “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of trafficking in persons, in particular women and children”. This is slightly wider than existing specialised treaty prohibitions on trafficking which tend to focus only on women and children, (Hall, *ibid.* pp.80-81). In another way, it may be more limited than customary international law. In the general part, by focusing on the act of enslavement rather than the slavery type of status, it excludes various slavery-type practices previously accepted as crimes against humanity, see Hall, *ibid.* p.54. Torture is fairly broadly defined, (Article(2)(e)) excluding, for instance the Torture Convention requirements of purpose behind the torture and it being committed by, or with the consent of a State official. (1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (GA Resolution 39/46, UN Doc. A/39/51), see Hall, *ibid.* p.84. One possible limit is that it is said not to apply to “lawful sanctions”. This has been taken, in the final analysis, to mean lawful under international law, not merely national law, (See Hall, *ibid.*, p.84).



of population". This may be a positive development, given that it includes forcible internal displacement, in addition to deportation across international boundaries.<sup>200</sup> It is likely that this was the case already, given the condemnation of "ethnic cleansing".<sup>201</sup> There is one possible problem. In the definition of this crime (Article 7(2)(d)), the deportees/transferees must be transferred "from the area in which they are lawfully present, without grounds permitted in international law". It is to be hoped that "lawfully" in the definition refers to international legality, as otherwise it would enable the national law of the State to declare they were not there legally and effectively exempt themselves from liability.<sup>202</sup>

In addition to rape, Article 7(1)(g) also prohibits "sexual slavery, forced pregnancy, enforced sterilization, or any other sexual violence of comparable gravity". There can be little doubt that these acts amount to inhumane acts and their express inclusion is welcome, but in no way goes beyond existing international law. Both the ICTY and ICTR in the various cases have stated that serious sexual assaults were prohibited as other inhumane acts.<sup>203</sup> In addition, sexual slavery comes under the clearly existing heading of slavery; all the acts mentioned in 7(1)(g) are likely to come under the heading of torture, some may also be forms of genocide.<sup>204</sup> One possible limit in the definitions is that forced pregnancy is only included if it involves "the unlawful confinement, of a woman made forcibly pregnant, with the intent of affecting the ethnic composition of any population

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<sup>200</sup> See Hall, *ibid.* pp.55-57, pp.81-82.

<sup>201</sup> A. De Zayas, "International Law and Mass Population transfers" (1974) 16 *Harvard I.L.J.* 207, pp.252-257, thinks they probably would already come under the Nuremberg Principles, but is not totally sure. This, though was the position over twenty five years ago, and the specific condemnation of ethnic cleansing militates in favour of this being merely a clarification of the "inhumane acts", if not deportations part of the Nuremberg definition.

<sup>202</sup> Hall, *supra* n.115, pp.81-82, states that the "lawfully present" must refer to international law, if this is so, the drafters could have been more explicit. On the other hand, it is clear from the "lawful sanctions" part of the definition of torture, this refers ultimately to international law. See Hall. *ibid.* p.84.

<sup>203</sup> K.D. Askin, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status" (1999) 93 *A.J.I.L.* 97, pp.102-103 claims *Tadic* was convicted of a crime against humanity for his part in assaults some of which may have had a sexual nature (*supra* n.96, paras 729-730). although the particular assaults they mention are not all sexual, it is clear they accepted that these could amount to crimes against humanity. They certainly accepted this in *Prosecutor v Furundzija*, Judgment, 10 December 1998, IT-95-17/1-T, paras 168-69, 186 and *Akayesu*, *supra* n.193, paras 690-692, See generally Askin, *ibid.* pp.99-115.

or carrying out other grave violations of international law”. This intent requirement was placed in the Statute to avoid an impasse between the Vatican and certain womens’ rights groups due to its possible effect on abortion laws.<sup>205</sup> Avoiding such an eventuality was certainly right, but to add an intent requirement dangerously close to a discriminatory intent, or to make it contingent on being related to other violations of international law, may have been a step too far in diluting the prohibition.

The last express examples of the “murder-type” crimes against humanity<sup>206</sup> are contained in Article 7(1)(i) and 7(1)(j). The crime of “enforced disappearance of persons”<sup>207</sup> is beyond doubt a crime against humanity. It was described as such in the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearances,<sup>208</sup> and was included in the 1996 ILC Draft Code.<sup>209</sup> In reality, disappearances have a longer history as crimes against humanity. In Nuremberg, Keitel was convicted for promulgating the “*Nacht und Nebel*” decree, which essentially instituted a system of disappearances.<sup>210</sup> Its inclusion is welcome, but it is in no way in advance of international law.

Article 7(1)(j) creates the crime of *Apartheid*, which had been declared (by the General Assembly) a crime against humanity in 1965.<sup>211</sup> It was included in both the Non-

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<sup>204</sup> Hall, *supra* n.115, pp.62-63. Rape has been accepted as torture for example in *Akayesu*, *supra* n.193, para 597, *Furundzija*, *supra* n.203, paras 158-164; *Prosecutor v Delalic, Mucic, Delic, & Landzo*, Judgment, 16 November 1998, IT-96-21-T, (*Celebici*) paras 494-496. Enforced sterilization, within the idea of genocide as measures intended to prevent births within the group. *US v Brandt* 3 T.W.C. 171 accepted that sterilization experiments were crimes against humanity. (See Hall, *ibid*).

<sup>205</sup> von Hebel & Robinson, *supra* n.100, p. 100. See also Article 7(2)(f), which also states that it does not affect national abortion laws, to avoid conflict with the Holy See.

<sup>206</sup> It is generally accepted that there are two types of crime against humanity, the “murder type”, which are made up of those correlating to the crimes mentioned in Article 6(c) of the London Charter before the phrase “before or during the war” and the “persecution type crimes against humanity, which are those appearing after that phrase which are subject to a different intent requirement. See Schwelb, *supra* n.115, p.190 (although Schwelb is doubtful if this differential is helpful here).

<sup>207</sup> Defined in Article 7(2)(i) as “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge the deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time”. The last part may be an unnecessary addition. The UN Declaration does not include the requirement of a “prolonged period of time”.

<sup>208</sup> GA Res 47/133, UN Doc. A/RES/47/133. See also UN Doc E/CN.4/1995/36 para 45, Inter American Convention on the Forced Disappearance of Persons 9 June 1994, (1994) 33 *I.L.M.* 1529.

<sup>209</sup> See generally, Hall, *supra* n.115, p.72.

<sup>210</sup> Nuremberg IMT Judgment, *supra* n.4, p.229, See Hall, *ibid.*, p.71.

<sup>211</sup> GA Resolution 2054, UN Doc. A/6014 p.16.



Applicability,<sup>212</sup> and Apartheid Conventions<sup>213</sup> as a crime against humanity. There were doubts about its customary nature, but it was included in the 1991 draft code.<sup>214</sup> Even with its dubious claim to customary status, its inclusion in the Statute, as formulated, is probably not in advance of international law. Apartheid is defined in Article 7(2)(h) as “inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.” This is narrower than the Apartheid Convention definition,<sup>215</sup> and it is difficult to envisage any crime covered under this definition that would not be caught under the other “murder-type” or “persecution type” crimes against humanity.

The final “murder-type” crime against humanity is the catch-all provision in 7(1)(k) of “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health”. This is in accordance with the Nuremberg, Tokyo, ICTY and ICTR Statutes. Equally, this formulation adds the condition beginning “intentionally causing great suffering”.<sup>216</sup> This is in accordance, *inter alia*, with understanding of its Statute by the ICTY in the *Tadic* case, which does not expressly include the requirement.<sup>217</sup> It is narrower than the ICTY’s formulation in the *Celebici* case however, omitting the additional protected characteristic of human dignity.<sup>218</sup> The *Celebici* judgment may not represent international law here, and the Statute is probably broadly coterminous with international law on this point.

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<sup>212</sup> 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, GA Resolution 2931, 754 UNTS 75, Article 1(b). This caused much controversy in the negotiations and is partially responsible for the relatively low number of ratifications this convention has achieved. See R.H. Miller, “The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity” (1971) 65 *A.J.I.L.* 476, pp.491-492.

<sup>213</sup> 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, 1015 UNTS 245, Article 1.

<sup>214</sup> See L.S. Sunga, *The Emerging System of International Criminal Law* (The Hague: Kluwer, 1997) pp.119-123. On *Apartheid* generally see R.S. Clark, “Apartheid” in Bassiouni (ed.), *supra* n.57, 643.

<sup>215</sup> Hall, *supra* n.115, pp.87-90.

<sup>216</sup> See Hall *ibid.*, pp.75-78.

<sup>217</sup> *Tadic supra* n.96, para 730.

<sup>218</sup> *Ibid.* para 509 See Hall, *supra* n.115, p.79.

The Statute also covers the other, “persecution-type” crimes against humanity.<sup>219</sup> Article 7(1)(f) defines them as “[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender... or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”. The definition is at once both codificatory, a positive development, and possibly a little retrogressive. The codificatory part is clear from the inclusion of political, racial, religious or ethnic grounds.<sup>220</sup> There are two new categories, and a new catch-all provision. The first of these is cultural grounds: this had previously only appeared in the 1954 and 1991 Draft Codes, but not in the 1996 Code or any Tribunal Statute.<sup>221</sup> The second is gender, which has never appeared previously in definitions of crimes against humanity, although its appearance was overdue. The final ground is a catch-all, albeit one with a high threshold.<sup>222</sup> This threshold is new. There were concerns in Rome though, that an activist court could use this crime to delve very deeply into the policies and acts of States, becoming, in effect, a human rights guardian rather than an enforcer of international criminal law.<sup>223</sup> So a limit was introduced. To be prosecutable under the Statute the acts must be connected to acts referred to in the rest of the paragraph, or any other crime in the jurisdiction of the court.<sup>224</sup> This requirement is probably not present in customary international law, although it is not without support. Still, it is unlikely that it will be of practical import unless the court began to act in a very adventurous way.<sup>225</sup>

In all, the definition of crimes against humanity in the Statute is a curious mixture of progressive development, regression and codification. The introduction of new express acts such as disappearances is welcome, if only as it clarifies their inclusion. The increased

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<sup>219</sup> Their inclusion was not controversial, as they had previously appeared in the London and Tokyo Charters, the 1954 and 1991 and 1996 Draft Codes, and the ICTY and ICTR Statutes. See Boot, *supra* n.115, pp.66-67.

<sup>220</sup> Except ethnic, (which only appears in the ICTR Statute (but is subsumed under racial (Boot, *ibid.*, p.69.)) These all appear in the Nuremberg and Tokyo IMTs’ Charters, and both UN Tribunal Charters.

<sup>221</sup> Boot, *ibid.* p.68.

<sup>222</sup> *ibid.* p.70-71.

<sup>223</sup> Robinson *supra* n.54, p.53-54.

<sup>224</sup> See Boot, *supra* n.115, pp.71; Robinson, *ibid.*, pp.54-55.

<sup>225</sup> Robinson, *ibid.*, p.55.



protection on grounds of gender and protection from sexual crimes is particularly welcome. Against this must be placed the definitions of some of the offences, which are more restrictive than current customary international law. Although, by virtue of Article 10 the definitions in the Statute are said not to affect custom, it is likely that they will do so, or at least affect the domestic incorporations of the offences. The Statute definitions will in all likelihood become the accepted definitions of offences, particularly as they are the first widely drafted expressions of the offences.

Still, the definition could have been worse, and it has been generally welcomed as a “modernized and clarified” definition, which provides a sound basis for prosecution.<sup>226</sup> What can be seen, even if this is accepted, is an increased desire by States to restrain the ICC from exercising autonomous judgment on what amounts to a crime against humanity. Creating a detailed elaboration of almost all aspects of crimes against humanity did this, although it cannot be doubted that in many areas, definitional precision was required. Crimes against humanity were the most ill defined of international crimes, low in legitimacy by the yardstick of determinacy. There was a price to pay for this clarity though, in particular the raising of the threshold for all crimes against humanity means that the definition is less inclusive than customary international law. Therefore States can be seen to have taken a very different approach in drafting the Rome Statute to that taken in the ICTY’s Statute drafting and (to a lesser extent) that of the ICTR, where the Tribunals were given the power to explore the parameters of responsibility here. It is also clear that a far less expansive view of customary law was taken than in 1945 for the IMTs, where the very vague definitions were imposed, arguably in excess of the international law existing at the time.

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<sup>226</sup> *Ibid.* pp.56-57.

Genocide was not expressly included in the jurisdictional provisions of first two IMTs. It was mentioned in the Nuremberg indictment, and some of the Prosecutors' speeches,<sup>227</sup> but was not charged separately to crimes against humanity, and there was no mention of the word in the IMT judgment.<sup>228</sup> General Assembly Resolution 96(I) began the official process of expressly creating the offence of genocide in its own right,<sup>229</sup> declaring that "genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world".<sup>230</sup> The Genocide Convention was promulgated in 1948, and within three years the ICJ had declared it reflective of custom.<sup>231</sup>

Given the Convention's background and the conflicts leading up to their creation, the inclusion of genocide in the ICTY and ICTR Statutes was not only uncontroversial, but inevitable. Both Statutes adopted *verbatim* the definition from Article II of the Genocide Convention.<sup>232</sup> The largest difference of opinion involved in the creation of the ICTR's jurisdiction was the Rwandan contention to the Security Council that genocide should be the only crime in the ICTR's jurisdiction.<sup>233</sup> In the negotiations leading up to the Rome Conference there were a few suggestions that the groups against which the

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<sup>227</sup> M Shaw, "Genocide and International Law" in Y. Dinstein (ed.) *International Law at a Time of Perplexity* (Dordrecht: Martinus Nijhoff, 1989) 797, notes, p.799, 1 Nuremberg IMT Proceedings (Nuremberg, 1947) pp.43-44.

<sup>228</sup> M Lippman, "The Convention on the Prevention and Punishment of Genocide: Fifty Years Later" (1998) 15 *Arizona J.I. & C.L.* 415 pp.426-427, see also J. Kunz, "The United Nations Convention on Genocide" (1949) 43 *A.J.I.L.* 738; le Blanc, *supra* n.29; Bryant & Jones, *supra* n.29; Ratner & Abrams, *supra* n.4, Chapter 2; A.K. Kuhn, "The Genocide Convention and State Rights" (1949) 42 *A.J.I.L.* 498; M. Lippman, "The Convention on the Prevention and Punishment of Genocide, Forty-Five Years Later (1994) 8 *Temple I. & C.L.J.* 1; D.D. Ntanda-Nsereko, "Genocide, A Crime Against Mankind" in McDonald & Swaak-Goldman (eds.), *supra* n.141; M. Lippman, "Genocide" in Bassiouni (ed.), *supra* n. 589. Interesting reviews of the UN tribunal's jurisprudence may be found in A.K.A. Greenawalt, "Rethinking Genocidal Intent: The Case for a Knowledge Based Interpretation" (1999) 99 *Columbia L.R.* 2259 and G. Verdirame, "The Genocide Definition in the Jurisprudence of the *ad hoc* Tribunals" (2000) 49 *I.C.L.Q.* 579.

<sup>229</sup> The groundbreaking work of Raphael Lemkin, in *Axis Rule in Occupied Europe* (New York: Carnegie Endowment for International Peace, 1944) was, of course the work of a private individual.

<sup>230</sup> GA Resolution 96(I), UN Doc. A/64/Add.1 p.189. It is important to note that the groups protected by the prohibition of genocide in Resolution are wider than those in the Genocide Convention, as the resolution includes "political or any other groups", a phrase absent from Article II of the Genocide Convention, which has a closed list, not including, *inter alia*, political groups. See Lippman (1994), *supra* n.228, pp.27-30.

<sup>231</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Case* (1951) *ICJ Rep.* 15.

<sup>232</sup> ICTY Article 4, ICTR Article 2. See Secretary-General's Report, *supra* n.46, para 35.



discriminatory intent must rest should be extended to cover other groups, such as those defined by reference to gender, culture or social criteria.<sup>234</sup> Although these proposals have some merit,<sup>235</sup> it was considered that the Convention definition was too settled to reopen now, and thus at the Rome Conference a “quick and unanimous” decision was taken to define it as in the convention.<sup>236</sup> The only difference between the Rome Statute and Genocide Convention definitions is that the ancillary crimes in Article II of the Genocide Convention are separated off into a separate section in the Statute.<sup>237</sup> Here there is little to comment upon, except that the post-1948 history of genocide shows how a convention, which arguably contains a definition of an offence narrower than previous formulations, will supersede the wider previous law, and become the accepted definition. Once this has occurred, it is very unlikely that such a definition will be reopened, as those seeking to reopen the definition will be countered with a “Pandora’s box” counter argument.

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## WAR CRIMES

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### NUREMBERG AND TOKYO IMTS

The first provision relating to war crimes in this study is Article 6(b) of the London Charter. This granted the Nuremberg IMT jurisdiction over war crimes, which it defined as “violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war

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<sup>233</sup> Morris & Scharf, *supra* n.7, p.164 said this was rejected as it would be one sided, and RPF atrocities had to also be at least theoretically under the ICTR’s jurisdiction. See also Schraga & Zacklin, *supra* n.50, p.508.

<sup>234</sup> Politi, *supra* n.102, p.124, Hall, *supra* n.160, p.180, Hall *supra* n.102, p.126, Report, *supra* n.101, Vol II pp.56-57, Vol I, p.17).

<sup>235</sup> See e.g. Lippman (1998), *supra* n.228, pp.464-465, *contra* Shaw, *supra* n.227, p.808-9 who notes that they are not immutable groups. He has a very powerful argument, but one problem it raises though, that racial/ethnic or religious conflicts can all too easily be alleged to be political, he accepts the problem, but does not appear to give much weight to it.

<sup>236</sup> Arsanjani *supra* n.103, p.30.

<sup>237</sup> Article 25. See Sarooshi, *supra* n.109, p.397.

or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”

This was the least controversial charge at the Nuremberg IMT: no one questioned its legality.<sup>238</sup> The law of war crimes has a very long and rich history.<sup>239</sup> Humanitarian law’s penal aspects had been consistently reaffirmed prior to World War II.<sup>240</sup> For example, it was accepted by the 1919 Commission that war crimes were punishable by belligerents,<sup>241</sup> a position taken up by the Treaty of Versailles (Article 228). In the Leipzig trials, the German Supreme Court accepted that international law created liability for war crimes.<sup>242</sup> During WWII, at one point the Wehrmacht asserted that the Hague regulations imposed only State liability, but Germany tried (or planned to try) Allied soldiers of various nationalities for war crimes during the war.<sup>243</sup> In relation to the definition two things must be noted. First, the listed acts are basically uncontroversial, they generally reflect acts identified in the 1919 Commission report as war crimes.<sup>244</sup> Secondly, the list is open-ended and thus the Nuremberg IMT was entitled to add all other violations of the laws and customs of war it thought were applicable.<sup>245</sup> The Tokyo Charter granted even further powers to the Tokyo IMT to determine what amounted to a war crime, as its jurisdictional provision defined war crimes as “violations of the laws and customs of

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<sup>238</sup> Wright, *supra* n.157, p.59.

<sup>239</sup> See, for example, H. McCoubrey, *International Humanitarian Law* (Aldershot: Dartmouth, 2<sup>nd</sup> ed., 1998) pp.8-32; C. Greenwood, “Historical and Legal Basis” in D. Fleck (ed.) *Handbook of Humanitarian Law in Armed Conflicts* (Oxford: OUP, 1995) 1, pp. 12-23; L.C. Green, *The Contemporary Law of Armed Conflict* (Manchester: MUP, 2<sup>nd</sup> ed., 2000) chapter 2.

<sup>240</sup> G. Komarow, “Individual Responsibility Under International Law: The Nuremberg Principles in Domestic Legal Systems” (1980) 29 *I.C.L.Q.* 21, p.22 is only exaggerating a little when he asserts that it has been recognised “since time immemorial”. Vitoria, Grotius, Moser and Wolff all supported this position, see H. Lauterpacht, “The Law of Nations and the Punishment of War Criminals” (1944) 21 *B.Y.B.I.L.* 58, p.61. In the late 19<sup>th</sup> Century, the Institute of International Law confirmed there was individual liability for violations of the laws of war, as did Holland (the writer), see Lauterpacht, *ibid.* p.62.

<sup>241</sup> 1919 Commission, *supra* n.67, pp.434-436.

<sup>242</sup> *Llandovery Castle* (1921) 15 *A.J.I.L.* 708 See McCormack, *supra* n.120, p.50; On the trials generally, see Woetzel, *supra* n.57, pp.31-34; S. Glueck (*War Criminals*), *supra* n.57, pp.31-34.

<sup>243</sup> See A. de Zayas, *supra* n.126, pp.91-92; This refrain relating to the alleged non criminal nature of violations of the Hague Convention and Regulations was repeated by some German authors after the war, but has been generally rejected. See K.R. Chaney, “Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials” (1995) 14 *Dickinson J.I.L.* 57, pp.71-72. See Oppenheim 7<sup>th</sup> ed. *supra* n.57, p.579

<sup>244</sup> *Supra* n.67, pp.435-436. The killing of hostages is not expressly included, but could be covered by others in their list (particularly imposing collective penalties).

<sup>245</sup> This they did, for example claiming that all the Hague Regulations were customary, Nuremberg IMT Judgment, *supra* n.4 p.248.



war”. It can be seen that the provision left the decision relating to what amounted to a war crime, and the definitions given to them, entirely to the discretion of the court.<sup>246</sup>

## ICTY

Article 2 of the ICTY Statute grants the ICTY jurisdiction over:

“persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages”.<sup>247</sup>

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<sup>246</sup> It is perhaps, therefore ironic that they took a less expansive view of customary international law, stating that only parts of the Hague Rules and 1929 Geneva Convention were customary see Tokyo IMT Judgment, p.48,442. McCoubrey notes that the Tokyo Charter definition may actually be the best of the existing definitions, H. McCoubrey “War Crimes Jurisdiction and a Permanent International Criminal Court: Advantages and Difficulties” (1998) 3 *J.A.C.L.* 9, p.18.

<sup>247</sup> This basically adopts the language of Article 147 GCIV (Bassiouni & Manikas, *supra* n.44, p.487), but interestingly, as Joyner, *supra* n.99, p.83 notes although retaining the phrase “persons or property protected” in the definitions of acts, the phrase “protected person” is replaced by “civilian”. This could be a problem, in that

If Article 2 is taken (as it has been by the ICTY)<sup>248</sup> as applying in the same way as the conventional Grave Breach provisions of the Geneva Conventions (in international armed conflicts alone) then from the viewpoint of conformity with customary international law it must be seen as utterly unobjectionable. It is beyond doubt that the examples in Article 3 represent customary war crimes.<sup>249</sup> It is perhaps unfortunate that the Grave Breach provisions of Additional Protocol I (API) were not added here, as Yugoslavia was a party. However, as API was not considered undoubtedly customary, it was not put in the Statute.<sup>250</sup> There is an area of controversy relating to Article 2. Some (such as Joyner) assert that Article 2 is intended to apply to any internal conflicts in former Yugoslavia. This was supported by the Trial Chamber in the *Tadic* case, but it was overruled on appeal (with Judge Abi-Saab dissenting).<sup>251</sup> It is possible that if it was meant to apply in internal conflicts then it would be more difficult to bring into line with existing customary international law,<sup>252</sup> but the application of Article 2 to all conflicts in former Yugoslavia may have been what was intended.

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the phrase “protected person” is wider (see Articles 49-51 GCI, 50-51 GC II, 129-130 GCIII). It may be that Joyner was correct in asserting it showed as desire for it to be applied irrespective of the characterisation of the conflict. It is not, though, the interpretation taken by the ICTY.

<sup>248</sup> With the notable and mounting exceptions of the Trial Chamber in *Prosecutor v Tadic*, Decision on the Defence Motion on the Jurisdiction of the Tribunal, 10 August 1995 IT-94-1-T, paras 50-53. and Abi-Saab in *Tadic* AR 72, *supra* n.139, Separate Opinion; *Celebici* *supra* n.204, para 202 and Separate Opinion of Judge Rodrigues in *Prosecutor v Aleksovski* Judgment, 27 June 1999, IT-95-14/1-T, Dissenting Opinion of Judge Rodrigues. Most academic opinion supports the idea that it applies in international conflict alone, see Hochkammer, *supra* n.175, p.157; Fenrick *supra* n.197, pp.199-202. S.D. Murphy, “Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia” (1999) 93 *A.J.I.L.* 57, pp.69-70 shows some discomfort with the approach of the *Tadic* appeal here, and asserts their approach was “narrow” and “perhaps reasonable minds can differ on the interpretation of Article 2” *ibid.* p.70, Bassiouni & Manikas, *supra* n.44, pp.441-479 look at the conflict and say it should be treated as international.

<sup>249</sup> Secretary-General’s Report, *supra* n.46, para 37 *Tadic* AR 72, *supra* n.139, para 83; Fenrick, *supra* n.197, p.199, T. Meron, “The Geneva Conventions as Customary Law” (1987) 81 *A.J.I.L.* 348.

<sup>250</sup> Schraga & Zacklin, *supra* n.44, p.364.

<sup>251</sup> Note that in the decision of the Supreme Court (Chile) Rol 469, 9 September 1998 the Chilean Supreme Court determined the Geneva Conventions Applied to the (internal) situation in Chile as an internal decree had declared a state or time of war.

<sup>252</sup> This was the bone of contention between Judge Abi-Saab and the majority in *Tadic* AR72, *supra* n.139, Separate Opinion of Judge Abi-Saab. It was also the position of the US in its *amicus curiae* brief in the *Tadic* case, see *Tadic*, *ibid.*, para 83. See also S. Boelaert-Suominen, “Grave Breaches, Universal Jurisdiction and Internal Armed Conflicts: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for all Armed Conflicts? (2000) 5 *J.C.S.L.* 63.



The Statute studiously avoids characterising the conflict as international or internal,<sup>253</sup> and a plausible interpretation of the changing of the words “protected person” to “civilian” (and prisoner of war) was a way of perpetuating the purposeful silence of the Statute on this point.<sup>254</sup> This, in turn could amount to a subtle hint that the Article was meant to apply irrespective of the nature of the conflict(s). On the other hand, the Secretary-General’s report did assert that the Grave Breaches provisions were the “core of customary international law applicable in international armed conflicts”.<sup>255</sup> Even so, as was seen above, the commentary does not always reflect the provisions of the Statute, and his later comment that the Security Council had reaffirmed that persons ordering such violations “in the territory of the former Yugoslavia”<sup>256</sup> were potentially liable could be seen as a counterbalance to the earlier reference to international armed conflicts. It is possible that due to the agreements reached between the parties to apply various parts of the Geneva Conventions, and the Commission of Experts conclusion that the conflict should be treated, as a whole, as an international armed conflict,<sup>257</sup> meant that the drafters of the ICTY Statute thought that the Grave Breach provisions could be taken as applying throughout Yugoslavia. It is interesting that although the Appeals Chamber in *Tadic* limited the application of Article 2 to international armed conflicts, the ICTY has been assertive in its claims that the various aspects of the conflicts in Bosnia were international armed conflicts, thus ensuring Article 2 remains of use.<sup>258</sup>

If it is the case that Article 2 was only intended to apply to international armed conflicts, the same cannot necessarily be said for Article 3, which grants the ICTY jurisdiction over:

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<sup>253</sup> See Article 5 which claims crimes against humanity are criminal in international or internal armed conflicts. Nowhere in Statute is the conflict determined to be one or the other, and the US suggestion that the conflict be determined to be international was not adopted (*ibid.*).

<sup>254</sup> The Appeals Chamber in *Tadic*, *supra* n.139, did not deal with the alteration of language to from that of the Geneva Conventions.

<sup>255</sup> *Supra* n.46, para 37.

<sup>256</sup> *Ibid.* para 39.

<sup>257</sup> Final Report of the Commission of Experts Established Pursuant to SC Resolution 780, 49 UN SCOR Annex, UN Doc. S/1994/674, paras 42-44.

<sup>258</sup> See, for example, *Tadic* appeal, *supra* n.152, paras 146-162. For a critique of the ICTY’s early approach see T. Meron, “Classification of Armed Conflict in Former Yugoslavia: Nicaragua’s Fallout” (1998) 92 *A.J.I.L.* 236.

“persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science

(e) plunder of public or private property”.

The enumerated acts, drawn as they are from the preamble of the 1868 St Petersburg Declaration and the Hague regulations<sup>259</sup> are beyond doubt reflective of customary international law.<sup>260</sup> They are, as Fenrick says, also rather outdated.<sup>261</sup> Unlike Article 2 though, omissions from the list of acts are not dispositive. In Article 3, as with the Nuremberg definition, the list included is illustrative only, and the ICTY is thus empowered to add such crimes as it considers to be within the term “violations of the laws or customs of war”.<sup>262</sup> There are different views as to the extent of the discretion vested in the ICTY. Bassiouni and Manikas claim that the principles of legality mean that

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<sup>259</sup> St. Petersburg Declaration renouncing the use, in times of war, of Explosive Projectiles Under 400 Grams Weight 58 *B.F.S.P.* (1867-1868) pp.16-17; Regulations attached to Hague Convention IV, UKTS 9 (1910), Cd 5030. (Article 23(a),(e), 25, 27, and 47).

<sup>260</sup> Nuremberg IMT Judgment, *supra* n.4, p.248 ; Secretary-General’s Report, *supra* n.46, paras 41-44. On Article 3 see, H. McCoubrey, “The Concept and Treatment of War Crimes” (1996) 1 *J.A.C.L.* 121, pp128-131; Morris & Scharf, *supra* n.148, pp.69-72; Bassiouni & Manikas, *supra* n.44, pp.509-511; O Brien, *supra* n.99, p.646, W. Fenrick, “Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia” (1995) 6 *Duke J.C. & I.L.* 103, pp105-108.



the ICTY could not go beyond close analogies to the acts listed.<sup>263</sup> This betrays a rather conservative approach to the principles of legality, which prohibit retroactive criminality. There seems no reason to extend the limits further than that. If the violation of the laws and customs of war was already criminal in customary international law, or in that country (for example, here by virtue of Yugoslavia's ratification of Additional Protocol I)<sup>264</sup> then there is no violation of the principles of legality when that act is prosecuted. The more common view of the discretion expressed in Article 3 is that it extends at least to all serious violations of the customary law of armed conflicts which entail individual liability.<sup>265</sup> This is the view taken by the ICTY in the *Tadic* case.<sup>266</sup> They also said that the applicable treaty rules were prosecutable under Article 3. This amounted to a "creative and progressive" view,<sup>267</sup> but one that seems clearly referable to the text of the Statute.

The Secretary-General's report could militate against such an interpretation. He asserted that the basis of the Article was the Hague rules as interpreted by the Nuremberg IMT.<sup>268</sup> If this was the case, the provision should have been so formulated in the Statute. It would be unconscionably retrogressive to limit a definition of violations of the laws and customs of war in the last decade of the 20<sup>th</sup> century purely to violations of one convention drafted in the first decade of that century, and interpreted once by a tribunal nearly half a century before the ICTY. Too much development in both treaty and customary law has occurred in the interim. In the Security Council, several States expressed the view that Article 3 included all the law applicable to the Yugoslav conflicts.<sup>269</sup> Perhaps the most important consequence of this, though, is that Article 3 has been seen as granting the ICTY the right to effectively determine, at least for its purposes, what that customary international law is. It is the ICTY's determinations relating to what

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<sup>261</sup> Fenrick, *ibid.* p.107.

<sup>262</sup> O'Brien, *supra* n.99, p.646.

<sup>263</sup> Bassiouni & Manikas, *supra* n.44, p.510.

<sup>264</sup> 1977 Protocol I Additional to the Geneva Conventions of 29 August 1949, 1125 UNTS 3.

<sup>265</sup> See Morris & Scharf *supra* n.148, p.72; Fenrick, *supra* n.196, pp 210-211; J.J. Paust, "Applicable Substantive Law" (1994) 88 *Proc. A.S.I.L.* 241, p.242.

<sup>266</sup> *Tadic* AR 72, *supra* n.139, para 94.

<sup>267</sup> W.J. Fenrick, "International Humanitarian Law and Criminal Trials" (1997) 7 *Transnational L. & Contemporary Problems* 23, p.35.

is customary that have occasioned controversy. This controversy mostly surrounds its iconoclastic determination, in the *Tadic* interlocutory appeal, that the “laws and customs” of war entailing criminal responsibility now included certain violations committed in internal armed conflicts, over and above the prohibitions in Common Article 3.<sup>270</sup> The criminality of such violations was contested in some quarters.<sup>271</sup>

It is difficult to disagree with McCoubrey that the formulation in Article 3 of the ICTY Statute “has much to commend it”,<sup>272</sup> and in passing to the ICTY a discretion to determine the extent of the customary law of armed conflict, it enabled the ICTY to make a lasting contribution to the law.

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<sup>268</sup> Secretary-General’s Report, *supra* n.46, paras 41-44.

<sup>269</sup> S/PV. 3217, pp.11,15,19.

<sup>270</sup> *Tadic* AR72, *supra* n.139, paras 96-136.

<sup>271</sup> Schraga & Zacklin, *supra* n.44, pp.363-365 The *Tadic* interlocutory Appeal Judgment has generated a huge amount of literature and controversy. Although most commentators accept the desirability of the law *de lege ferenda* some seriously question whether the ICTY’s position was truly *de lege lata*. Supporting the decision see C. Greenwood, “International Humanitarian Law and the Tadic Case” (1996) 7 *E.J.I.L.* 265; Greenwood, *supra* n.171, pp.128-133 G.H. Aldrich, “Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia” (1996) 90 *A.J.I.L.* 64, pp.65-67; Fenrick *supra* n.196, p.40, T. Meron, “The Continuing Role of Custom in the Formation of International Humanitarian Law” in T. Meron, *War Crimes Law Comes of Age* (Oxford: OUP, 1998) 262, pp.263-268 (claiming that (p.268) most will accept the legal position as correct.). T. Meron, “Is International Law Moving Towards Criminalization?” (1998) 8 *E.J.I.L.* 18, p. 26 “a combination of assertive statutory interpretation and enlightened analysis of customary law”; L.G. Maresca, “The Prosecutor v Tadic: The Appellate Decision of the ICTY and Internal Violations of Humanitarian Law as International Crimes” (1996) 9 *L.J.I.L.* 219; C. Warbrick, “The United Nations System: A Place for International Criminal Courts” (1995) 5 *Transnational L. & Contemporary Problems* 237, pp.257-260 (more cautiously describing it (p.257) as “carefully made, but ambitious”). For opinions against the decision, see K Koschorreck & M. Müller, “Report on the International Criminal Tribunal for Yugoslavia” (1996) 39 *German Y.B.I.L.* 409, p.428; P. Rowe in C. Warbrick & P. Rowe, “The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals chamber on the Interlocutory Appeal on Jurisdiction in the *Tadic* Case” (1996) 45 *I.C.L.Q.* 691, 697, p.701 “its interpretation... sends a coach and four between the traditional distinctions between an international and a non-international conflict.”; G.R. Watson, “The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in *Prosecutor v Tadic*” (1996) 36 *V.J.I.L.* 687, pp.709-728. (Watson is probably the commentator least supportive of the decision, describing it (p.709) as “as bold as it is ill founded”). It is notable that in this case Judge Li dissented on this point, saying it amounted to an “unwarranted assertion of legislative power” by the Tribunal *ibid.* Separate Opinion of Judge Li, para 13. This author’s position is that the ICTY was generally correct, at least in accepting that certain violations of the law applicable in internal conflicts entailed criminal responsibility. It is too easily forgotten that the creation of the ICTR (by the Security Council), with penal jurisdiction over violations of the law applicable in internal conflicts preceded the *Tadic* decision by almost a year, and there is no principled reason why there could not be such liability (see *infra* p.257). There is some possible doubt about some of the particular acts they refer to as being customary, but the level of supporting evidence they gave was generally higher than has traditionally been given by tribunals applying humanitarian law (see Meron *ibid.*, pp.263-265, Fenrick, *ibid.*, p.40) On the acceptability of the use of *opinio juris* and practice in an interchangeable way. see F. Kirgis, “Custom on a Sliding Scale” (1987) 81 *A.J.I.L.* pp.146. As the Rome Statute showed the decision had a remarkably positive reception from States, and the *Tadic* judgment now stands as a landmark in international humanitarian law. Perhaps, like with the Nuremberg criminalisation of crimes against humanity, the extreme desirability of the position adopted overshadows any possible legal failings. It is also relevant that the controversial aspects of this case were *obiter*, Tadic was neither charged or convicted for the violations of humanitarian law they mentioned which have been the subject of most of the adverse commentary. There is no possibility of this now for Tadic as the Appeals Chamber, (*Tadic* Appeal) *supra* n.152, paras 83-171 determined the conflict he was involved in was international.

<sup>272</sup> *Supra* n.246, p.19.



## ICTR

The controversy relating to the classification of the conflict in Yugoslavia,<sup>273</sup> played itself out in the ICTY Statute and the discussions around it. This is not the case in relation to the ICTR Statute as the Rwandan conflict was clearly viewed by the Security Council as an internal conflict.<sup>274</sup>

The ICTR Statute's provision on jurisdiction over war crimes grants it jurisdiction over:

“persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective Punishments;

(c) Taking of Hostages;

(d) Acts of Terrorism;

(e) Outrages on Personal Dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

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<sup>273</sup> On which, see C. Gray, “Bosnia and Herzegovina: Civil War or Inter-State Conflict? Characterization and Consequences” (1997) 68 *B.Y.B.I.L.* 155.

<sup>274</sup> Morris & Scharf, *supra* n.148, p.142.

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts”.<sup>275</sup>

Some doubts have been expressed about the inclusion of this provision. Although Common Article 3 is generally accepted as being customary international law, and probably *jus cogens* too,<sup>276</sup> the same cannot be said for Additional Protocol II.<sup>277</sup> There are also arguments asserting the non-criminal nature of the humanitarian law applicable to internal armed conflicts.<sup>278</sup> The first argument can be dealt with quickly. Even if neither Common Article 3 or APII were customary international law, this would be irrelevant in the case of Rwanda. Rwanda was (and remains) a party to the four Geneva Conventions and Additional Protocol II. There is no legal reason why the Secretary-General had to limit himself to law “beyond doubt” customary for the ICTY Statute. The principle *nulum crimen sine lege* would not have been violated if he had asserted that the ICTY was to enforce all humanitarian law applicable in the conflict. The US and UK, in their comments to the Security Council, expressed the view that this was what Article covered, including the not fully customary API.<sup>279</sup> It is perhaps then, unsurprising that when the US was involved in drafting the ICTR, the resulting article reflected its view on what international tribunals could do, i.e. enforce the humanitarian law applicable to the relevant conflict.

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<sup>275</sup> ICTR Statute Article 4. The enumerated acts are drawn from Article 4(a)(b)(c)(d)(e)(g)(h) of Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts 1125 UNTS 609.

<sup>276</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v USA) Merits (1986) ICJ Rep 4. p.114, M. von Sternberg, “A Comparison of the Yugoslavian And Rwandan War Crimes Tribunals: Universal Jurisdiction and the ‘Elementary Dictates of Humanity’” (1996) 22 *Brooklyn J.I.L.* 111, p.134; T. Meron, *Human Rights and Humanitarian Norms as Customary Norms* (Oxford: OUP, 1989) pp.27-37; Report of the Commission of Experts on Rwanda S/1995/1125 para 87.

<sup>277</sup> See Meron *ibid*. pp.71-74, C. Greenwood, “Customary Status of the 1977 Geneva Protocols” in A.J.M. Delissen & G.J. Tanja, *Humanitarian Law of Armed Conflict, Challenges Ahead* (Dordrecht: Martinus Nijhoff, 1991) 93, 112-113; the Secretary-General’s Report on the ICTR Statute (*supra* n.50, para 12).



The second argument requires further enquiry. Although it is now (partially as a result of the *Tadic* ruling, the ICTR and the Rome Statute) accepted that the humanitarian law applicable in internal conflicts has penal characteristics, this may not have been the case in 1994. This has led to questions of if the use of these provisions for Rwanda was *ex post facto* legislation. It was not. Neither Common Article 3 or APII have provisions expressly making their violation criminal, but the laws of war have been traditionally considered to involve individual criminal responsibility. As Christopher Greenwood aptly points out “if violations of the international laws of war have traditionally been regarded as criminal under international law, there is no reason of principle why, once those laws came to be extended (albeit in attenuated form) to the context of internal armed conflicts, their violation in that context should not have been criminal, at least in the absence of a clear indication to the contrary.”<sup>280</sup> The absence of a provision criminalising breaches is not determinative of the matter. This, for example was the position in relation to the Hague Rules prior to the Nuremberg Trials.<sup>281</sup> On a similar note, as Müllerson notes, even the hallowed Grave Breach provisions, which are accepted as undoubtedly constituting war crimes under international law do not actually expressly bring this result about. The Grave Breach provisions create an obligation on parties to criminalise Grave Breaches in their domestic law.<sup>282</sup> They are silent about criminalisation by international law (unlike, for example the Genocide Convention). Meron advances a similar argument, saying that those rejecting the criminality of Common Article 3 and Additional Protocol II “confuse criminality with jurisdiction and penalties”<sup>283</sup>, and just because Common Article 3 and APII do not come under the Grave Breaches regime of mandatory extradition or

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<sup>278</sup> D. Plattner, “The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts”, (1990) 278 *I.R.R.C.* 409, p.414.

<sup>279</sup> *Supra* n.265.

<sup>280</sup> C. Greenwood, *supra* n.271, pp.280-281.

<sup>281</sup> Indeed the analogies here are worth remembering, there the laws of war, although criminal, were not expressly said to be so in the Hague Convention. Although there was no reason in theory why these would not be criminal, State practice was not abundant. The determination in the Nuremberg IMT that they were criminal was generally accepted. Almost half a century later, an almost identical situation arose in relation to treaties extending the laws of war to internal conflict.

<sup>282</sup> R. Müllerson, “International Humanitarian Law in Internal Conflicts” (1997) 2 *J.A.C.L.* 109, pp.123-124.

<sup>283</sup> T. Meron, “International Criminalization of Internal Atrocities” (1995) 89 *A.J.I.L.* 554, p.561.

prosecution does not mean that they are not criminal under international law.<sup>284</sup> In relation to Common Article 3 it should also be noted that the authoritative ICRC commentary notes that Common Article 3 was based on the national criminal laws of all States, thus increasing their claim to be understood as involving criminal liability.<sup>285</sup>

Still, it is the case that State practice in this area was fairly rare, although not entirely absent.<sup>286</sup> As a result; although this provision does not violate the principles of legality, it was a progressive interpretation of the law.<sup>287</sup> In relation to the listing itself, it is exceptionally important to note that despite the list being illustrative, it is bounded by the provisions in Common Article 3 and APII. This limits the ICTR's discretion. It cannot, in contrast to the ICTY, decide on violations of customary international law (or say what they are) beyond the provisions in the two documents. As a result it may be expected that the ICTR's jurisprudence on this may be of less precedential value in this area.

## ICC

War crimes were an exceptionally controversial aspect of the Rome Statute, and were settled only in the final Bureau proposal.<sup>288</sup> This is unsurprising. While a State may be fairly confident that its officials will not commit genocide or (as defined in the Rome

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<sup>284</sup> *Ibid.*, pp.568-570. As he notes, (p.569) this is also supported by the ICRC Commentary, which says that for violations other than Grave Breaches, "[States] should at least insert in their legislation a general clause providing for the punishment". J. de Preux (ed.) *Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: ICRC, 1960) p.624.

<sup>285</sup> *Ibid.* p.36.

<sup>286</sup> For some examples see the Belgian Law 16 June 1993, Nicaraguan Penal Code Libro II Titulo XIV Article 551, Nigerian Geneva Conventions Act, 1960 (with Operational Code of Conduct for Nigerian Armed Forces), Spain, Penal Code 10/1995, 23 November 1995 Libro II Titulo XXIV Article 608, Norwegian Military Penal Code Sec. 108, (as amended by Law No. 65 12 June 1981) With great relevance to the ICTY, s.142 of the Criminal Code of former Yugoslavia also includes violations of humanitarian law in internal conflicts, see Bothe, *supra* n.143, p.297. The US, German, UK and (probably) New Zealand military manuals can be read as accepting the criminal nature of the laws of war applicable in internal conflict, see *Tadic* AR72 *supra* n.139 para 131.

<sup>287</sup> Morris & Scharf, *supra* n.7, p.127 say that the international community had not expressly made them criminal. However, as they also note, during the Rwandan conflict the Security Council affirmed individual responsibility for violations of humanitarian law in that conflict in PRST/1994/21 and Resolution 935.

<sup>288</sup> For the Pre-Rome discussions and controversies see Politi, *supra* n.102, pp.132-133; Report, *supra* n.102, Vol II pp.59-66, Vol I pp.20-21; Hall, *supra* n.160, p.178, Hall, *supra* n.102, pp.128-129; C.K. Hall, "The Fifth Session of the Preparatory Committee for an International Criminal Court" (1998) 92 *A.J.I.L.* 331, pp.332-333; Zimmerman, *supra* n.102, 187-195. For Rome proposals see A/CONF.183/2.Add.1 & A/CONF.183/C.1/L.10, L.4, L.5, L.11, L.13, L.26, L.33, L.40, L.53 (Article 5), L.59 (Article 5*quater*), L.62,



Statute) crimes against humanity, the same cannot be said for war crimes, which are an omnipresent danger in times of armed conflict. The controversies raged around various issues, and it is best to deal with them in turn. First, in relation to the approach taken overall, the Rome Statute takes an entirely different track to the great preponderance of previous attempts to pass jurisdiction to international tribunals. Not least, it expressly covers both international and internal conflicts (albeit not in the same paragraphs, or form). Most importantly, it contains a closed list, thus there is no discretion in the court to add any further war crimes, irrespective of their applicability to the conflict either by virtue of treaty or customary international law. There is no possibility of a *Tadic* type decision in the ICC.<sup>289</sup> In addition to this, as a closed list, it can only be altered by an amendment to the Rome treaty, and this has a very high threshold. Thus when evaluating the definition, it must be remembered that it will also be the only one for the foreseeable future.<sup>290</sup>

The first definitional issue is the *chapeau*: Article 8 grants the ICC jurisdiction “in respect of war crimes, in particular when committed as a part of a plan or policy or as part of a large scale commission of such crimes”. This was a compromise between the US who wanted the court to only deal with war crimes when they were committed as part of a plan or policy or as part of a large scale commission of such offences, and most of the rest of the conference, which wanted no such limit.<sup>291</sup> The result is that the court is to take jurisdiction primarily only over such offences, but is not limited to them. This limit has been welcomed by various authors,<sup>292</sup> and it is probably consistent with the general

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L.72, L.74, L.89, L.94. For discussion of the Statute see M. Cottier, W.J. Fenrick, P. Viseur-Sellers & A. Zimmermann, “Article 8” in Triffterer (ed.), *supra* n.102, 173.

<sup>289</sup> The importance of this cannot be overestimated, much of the customary international law of armed conflicts has arisen as a direct result of decisions by tribunals, quite simply, saying that a particular rule is customary. Sarooshi, on the other hand commends the list, as it shows where war crimes law stands today *supra* n.109, p.399. The problem is, the definition is for the future, no matter how it looks now, how we must question how it will look in twenty or thirty years. Also, in some respects, quite simply, it does not represent current thinking on the law of war crimes.

<sup>290</sup> The Rome definition effectively freezes the definition of war crimes for its purposes, and like as occurred with the Genocide Convention, this may become a straight jacket to future development of the law.

<sup>291</sup> Von Hebel & Robinson, *supra* n.100, pp.107-108.

<sup>292</sup> Scheffer, *supra* n.53, p.16; R. Wedgwood, “The International Criminal Court: An American View” (1999) 10 *E.J.I.L.* 93, p. 94; Cassese, *supra* n.111, p.149, (who states it would have been a welcome addition to the ICTY Statute).

limit of the court to the “most serious offences of international concern”.<sup>293</sup> It was right that the US proposal was rejected, as it collapses the definition of war crimes into that of crimes against humanity too easily and would have led to the court having to prove the additional elements, which are not present in war crimes law, to assert jurisdiction over the offence.<sup>294</sup>

## INTERNATIONAL ARMED CONFLICTS

The first set of offences over which the Court is granted jurisdiction was not controversial. Almost all agreed that Grave Breaches of the Geneva Conventions should be included for international armed conflicts.<sup>295</sup> They were.<sup>296</sup> The inclusion of other Grave Breaches was controversial. One of the controversies revolved the inclusion of rape expressly as a Grave Breach. It is accepted that rape falls within the Grave Breaches provisions as “torture or inhuman acts”,<sup>297</sup> but some thought it advisable to make its inclusion express. This was not done. The second area of contention was the inclusion of the Grave Breaches in API, which the ICRC asserted were mostly customary.<sup>298</sup> These were also not included in this part. This is not necessarily a problem, since both rape and many Grave Breaches of API are included elsewhere in the definition of war crimes. Here it is clear that those offences included in this part are beyond doubt customary,<sup>299</sup> and a necessary part of the jurisdictional arsenal of the ICC.

The second set of crimes consists of twenty-six “serious violations of the laws and customs applicable in international armed conflict, within the framework of international law, namely...”.<sup>300</sup> Before examining some of the enumerated acts, it is worthwhile pondering the meaning of the phrase “within the established framework of international

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<sup>293</sup> Rome Statute preamble, Article 1.

<sup>294</sup> See Zimmerman, *supra* n.102, p.186-187; J.J. Paust, “The Preparatory Committee’s Definition of War Crimes” (1997) 8 *Crim. L.F.* 431, p.432; Hall, *supra* n.288, p.332; Arsanjani, *supra* n.103, p.33. The *chapeau* prompted the ICRC into issuing a public statement of its concerns See A/CONF.183/INF/10.

<sup>295</sup> See Hall, *supra* n.160, p.178, Hall, *supra* n.102, p.332; Zimmerman, *ibid.*, p.187.

<sup>296</sup> Article 8(2)(a).

<sup>297</sup> T. Meron “Rape as a Crime Under International Humanitarian Law” in T. Meron, *supra* 204, p.207.

<sup>298</sup> Hall, *supra* n.102, p.128.

<sup>299</sup> See *supra* p.251.



law". When this provision was suggested in the PREPCOM, Paust criticised it as "unnecessary and confusing", given that the article deals with the laws and customs of war.<sup>301</sup> Nevertheless, the phrase remains. It is probable that it is intended to mean that matters such as military necessity and proportionality remain relevant,<sup>302</sup> but there remains the possibility that it means the enumerated crimes are only prosecutable by the Court to the extent that they are already demonstrably custom, which would limit the court even further, as well as go against the idea of the Rome Statute as a self-contained legal regime.<sup>303</sup>

Turning to the acts, certain parts clearly reflect customary international law, for example Article 8(2)(b)(xix) restates the prohibition of expanding bullets in Hague Declaration 3<sup>304</sup> while Article 8(2)(b)(v,vi,xi-xvii) restate provisions of the Hague Rules.<sup>305</sup> There are some problems here though, primarily in the refusal of the drafters to update the language of some of the provisions to put them in accordance with modern customary international law.<sup>306</sup> For example, Article 8(2)(b)(v) prohibits "attacking, or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives". When a similar provision was put in the ICTY Statute, it was criticised as "very limited".<sup>307</sup> It probably does not represent the customary international law on the subject, which grants wider protection to areas not making a direct military contribution to their State's war effort.<sup>308</sup> A similar thing may be said in relation to Article 8(2)(b)(ix). This adopts the prohibition of attacks "against

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<sup>300</sup> Article 8(2)(b). "namely" indicates that this is a closed list.

<sup>301</sup> Paust, *supra* n.294, p.434. Fenrick, *supra* n.288, pp.185-6 notes the vague nature of the provision, but does not consider it to introduce a requirement of proof of customary status.

<sup>302</sup> Arsanjani, *supra* n.103, p.33. A more controversial issue may be that of reprisals.

<sup>303</sup> See Cassese, *supra* n.111, pp. 151-152. He asserts that it is possible it was put in to emphasise that these acts were already contrary to customary international law.

<sup>304</sup> 1899 Hague Declaration 3 Concerning Expanding Bullets, 32 UKTS (1907) Cd. 3751. This is definitely customary international law, see McCoubrey, *supra* n.239, pp.232-233.

<sup>305</sup> Hague Rules, Annex to Hague Convention IV, Respecting the Laws and Customs of War on Land, 9. UKTS (1910) Cd.5030, Articles 25, 23(1)(c)(b)(d)(g)(h)(23(2)), 28,23(1)(a) respectively. On their customary nature, see above, p.150.

<sup>306</sup> For discussion in relation to PREPCOM, see Hall, *supra* n.288, p.332-333.

<sup>307</sup> W.J. Fenrick, "Attacking the Enemy Civilian as a Punishable Offence" (1997) 7 *Duke J.C. & I.L.* 539, p.549. It matters less in the ICTY Statute, as Article 3 allows the ICTY to use broader customary definitions.

<sup>308</sup> W.J. Fenrick, "Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia" (1995) 6 *Duke J.C. & I.L.* 103, pp.108-109.

buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected”. This has its basis in the Hague Rules,<sup>309</sup> although there are two differences between Article 27 of the Hague Rules and the Rome provision. First, buildings dedicated to education are added, but there is no advance here, since they are not military objectives. Also, this protection is granted only “provided they are not military objectives”, this grants less protection than the Hague Rules, which apply so long as the buildings “are not being used for military purposes”.<sup>310</sup>

In accordance with GCIV Article 28 and API Article 51(7) (both of which are regarded as customary)<sup>311</sup> using protected persons to render an area immune from attack is considered a war crime for the purposes of the Statute (Article 8(2)(b)(xxiii)).<sup>312</sup> These acts have been a depressingly familiar part of modern conflict. Equally familiar, but more difficult to apply, is the matter of collateral damage (or, less euphemistically, the killing of innocents as an “unintended but proportionate consequence”<sup>313</sup> of an attack on a military target). The customary rule is that stated in Articles 51(5)(b) and 85(3)(c) API.<sup>314</sup> This prohibits “[launching] an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. The ICC will have jurisdiction over “intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”. A positive development is the addition of “widespread, long term and severe

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<sup>309</sup> Although also relevant are the 1954 Cultural Property Convention and Articles 53 and 85(4)(d) API, see Arsanjani, *supra* n.103 p.33.

<sup>310</sup> Arsanjani, *supra* n.103, p.33.

<sup>311</sup> Greenwood, *supra* n.277, p.49, *contra* Meron, *supra* n.276 p.66.

<sup>312</sup> In going beyond civilians, it goes beyond the previous provisions, Fenrick, *supra* n.288, p.253, but bearing in mind the protections of protected persons, this is unobjectionable.

<sup>313</sup> M. Koskeniemi, “Faith, Identity and the Killing of Innocents: International Lawyers and Nuclear Weapons” (1997) 10 *L.J.I.L.* 137, p.142.

<sup>314</sup> On their customary status see Greenwood, *supra* n.171, pp.123-125. On the pre-Rome discussions see Zimmerman, *supra* n.102, pp.190-191.



damage to the natural environment". The provision is based on Article 35(3) of API, the customary status of which has been controversial.<sup>315</sup>

A less welcome pair of additions to the definition is the change from the language of API which is "which may be expected" to "in the knowledge" and of the final part to "clearly excessive in relation to the concrete and direct overall military advantage anticipated". It is true, as Wedgwood says that proportionality is a concept that is difficult to apply,<sup>316</sup> but that is no excuse for raising the threshold. Taking the change of the requirement from one "which may be expected" to it being made "in the knowledge" that it would violate proportionality, turns the objective part of the test into a subjective one.<sup>317</sup> This is made clear by the express derogation from the usual interpretation of knowledge in the Elements of Crimes. Normally, the requirement of "knowledge" does not require that a value judgment be made.<sup>318</sup> For this war crime, the value judgment (that it be "clearly excessive") is required to be proven by the prosecution.<sup>319</sup>

There are two other issues raised by the wording of the provision, the "overall military advantage", and the requirement that the damage be "clearly excessive" to that

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<sup>315</sup> On the controversy, see (in favour of at least a core customary status, or being close to it) C. Greenwood, "Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict" in P. Rowe (ed.) *The Gulf War 1990-1991 in International and English Law* (London: Sweet & Maxwell/Routledge, 1993) 68, pp.86-88; A. Cassese, "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law" (1984) 3 *U.C.L.A.P.B.L.J.* 55, pp.76-77; G.H. Aldrich, "Prospects for United States Ratification of Additional Protocol I" (1991) 85 *A.J.I.L.* 1, p.14; (against), Meron, *supra* n.276, p.66; A. Roberts, "Failures in Protecting the Environment in the 1990-1991 Gulf War" in Rowe, *ibid.*, 111, pp.125-127; R. Zedalis, "Burning of the Kuwaiti Oilfields and the Laws of War" (1991) 24 *Vanderbilt J.T.L.* 711; L.C. Green, "the Environment and the Law of Conventional Warfare" (1991) 29 *C.Y.B.I.L.* 222, p.232; S. Oeter, "Means and Methods of Combat" in D. Fleck (ed.), *The Humanitarian Law Applicable in Armed Conflicts* (Oxford: OUP, 1995) 105, p.118; K. Hulme, "Armed Conflict, Wanton Ecological Devastation and Scorched Earth Policies: How the 1990-1991 Gulf Conflict Revealed the Inadequacies of the Current Laws to Ensure Effective Protection and Preservation of the Environment" (1997) 2 *J.A.C.L.* 45, pp.60-61. An overview of the various positions is given by G. Plant, *Environmental Protection and the Law of War* (London: Bellhaven, 1992) pp.15-16, 21-27. The ICJ, in the *Nuclear Weapons* opinion reasserted the view that this aspect of API were not customary, ((1996) *ICJ Rep.* 4 para 31.) see D. Akande, "Nuclear Weapons, Unclear Law? Deciphering the *Nuclear Weapons* Opinion of the International Court" (1997) 68 *B.Y.B.I.L.* 165, pp. 186-187. The US Department of Defence Report to Congress on the Conduct of the Persian Gulf War, Appendix O, the Role of the Laws of War (1991) (1992) 31 *I.L.M.* 612, p.636 did not consider this part of API customary, but like much of the literature not accepting the customary status, it is now approaching a decade old. The past decade has seen increasing focus on the protection of the environment, and it may well now be customary.

<sup>316</sup> Wedgwood, *supra* n.292, p.103.

<sup>317</sup> The latter is a higher standard and limits the article further than required by customary international law, by turning what is ostensibly an objective test into a subjective one, with a higher threshold. For a discussion of this issue in relation to earlier formulations of the Statute see L. Sadat-Wexler (ed.), *Model Draft Statute for the International Criminal Court Based on the Preparatory Committee's Text* (Chicago: Érés, 1998) pp.18-20.

<sup>318</sup> PNICC/2000/INF/3/Add.2, p.5.

<sup>319</sup> *Ibid.* p.25.

overall military advantage. This will lead the court into very wide and difficult questions of “overall military advantage”. It could lead to a dilution of the prohibition: the further away from the individual attack focus lies, the more collateral damage may be thought acceptable.<sup>320</sup> The formulation in the Statute of overall military advantage is not unwarranted, it is in accordance, for example, with a number of “understandings” such as the UK’s, which state that “the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack”.<sup>321</sup> The Elements of Crimes promulgated under Article 9, though could represent a move away from the customary standard, by not requiring the “concrete and direct overall military advantage” to be “temporally or geographically related to the object of the attack”.<sup>322</sup>

Moving on to the nature that it be “clearly” excessive, this is a raising of the threshold. Fenrick defends this on the basis that prosecutors would be reluctant to prosecute unless the provision was clearly breached.<sup>323</sup> This may be the case, but this does not justify the formulation in Article 8(2)(b)(iv). The reasons he gives are the difficulties in determining proportionality, and the need to give some discretion to commanders.<sup>324</sup> If anything, Article 8(2)(b)(iv), by expanding the military advantage, has made it more difficult to determine proportionality, and there may be reason to suspect that prosecutors will only prosecute when the higher threshold provision of Article 8(2)(b)(iv) is itself very clearly breached, which would create a double upsurge in the limits on liability. The discretion could have been accommodated by adopting, as the ICTY

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<sup>320</sup> It indicates the difficulties inherent in this area, particularly where “overall military advantage” is concerned. Bolton’s comments show the politicisation here, even after their dilution: “A fair reading of these provisions leaves one unable to answer with confidence whether the United States was guilty of war crimes for its aerial bombing campaigns over Germany and Japan in World War II. Indeed, if anything, a straightforward reading of the language probably indicates that the Court would find the United States guilty. *A fortiori* these provisions seem to imply that the United States would have been guilty of a war crime for dropping atomic bombs on Hiroshima and Nagasaki”, J. Bolton, “Courting Danger What’s Wrong with the International Criminal Court” (1999) 55 *The National Interest* 60, p.63. It is interesting how, for many, the actions of their own countries are seen as apodictically legal.

<sup>321</sup> Reproduced in A. Roberts & R. Guelff, *Documents on the Laws of War* (Oxford: OUP, 3<sup>rd</sup> ed., 2000) p.511, the German declaration is substantially similar, see *ibid.* p.505.

<sup>322</sup> UN. Doc. PNICC/2000/INF/3/Add.2, p.24.

<sup>323</sup> Fenrick, *supra* n.288, p.197.

<sup>324</sup> *Ibid.*



prosecutor has, the test of the reasonable military commander.<sup>325</sup> Lastly, for parties to API, violations of that Protocol's (broader) formulation are Grave Breaches, thus there is a duty to prosecute all violations of it. This creates an interesting question of whether the Rome Statute is consistent with the obligations of parties to API under that protocol. It is relevant in this context to look back at the Kosovan conflict, which showed that States can limit their entire engagement with the enemy to air warfare, traditionally a fairly unregulated form of warfare.<sup>326</sup> This makes it imperative to maintain the integrity of what regulation there is. This has not been done in the Rome Statute. Prosecution of this offence will be very difficult indeed, and may well be rendered impossible by the provisions on documents whose surrender could implicate national security.<sup>327</sup> Decisions on military advantage and the nature of targets requires intelligence gathering, and States may refuse to hand over information relating to this, on the grounds that it would damage national security. The Rome Statute does not create a duty to hand over such information,<sup>328</sup> which could be the death knell to any prosecutions under this provision.

In respect of the denial of quarter, the Statute (Article 8(2)(b)(xii)) adopts the language of the Hague Rules rather than Article 40 of API, which has a strong claim to customary law status.<sup>329</sup> The same applies to the treacherous killing of an enemy (Article 8(2)(b)(xi)), as defined in the Hague Rules, rather than the customary definition of perfidy in API.<sup>330</sup> Article 8(2)(b)(vii), which adopts the Hague Rules' prohibition of misuse of flags and symbols (which it updates to include the UN symbol) is apparently narrower than the Hague Rules in requiring (as does API Article 85(3)(f)) that the misuse causes

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<sup>325</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Against the Federal Republic of Yugoslavia (undated), para 48.

<sup>326</sup> See C. af Jochnick & R. Normand, "The Legitimation of Violence: A Critical History of the Laws of War" (1994) 35 *Harvard I.L.J.* 49, pp.77-79, 81-87; O. Schachter, "UN Law in the Gulf Conflict" (1991) 85 *A.J.I.L.* 452, pp. 456-467.

<sup>327</sup> See Chapter 2, p.77.

<sup>328</sup> *Ibid.*

<sup>329</sup> T. Meron, *supra* n.276, p.63; C. Greenwood, *supra* n.277, p.106; Cassese, *supra* n.315, p.79.

<sup>330</sup> Article 37, see Meron, *ibid.* p.63; Greenwood, *ibid.* p.104-105.

death or serious personal injury.<sup>331</sup> In reality, this was probably the position under the rules, and is the current customary law.<sup>332</sup>

Other parts of customary law included in the Statute are the provisions based on the Geneva Conventions or the customary parts of API, such as Article 8(2)(b)(x).<sup>333</sup> Sexual crimes are covered in Article 8(2)(b)(xxii), namely “committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined in Article 7(2)(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva conventions”.<sup>334</sup> Rape and other sexual offences have long been accepted as war crimes,<sup>335</sup> despite being shamefully ignored in practice. This provision essentially develops Article 27 of Geneva Convention IV (GCIV).<sup>336</sup> Its additions are sexual slavery, forced pregnancy and enforced sterilization (which would in all likelihood also fall under 8(2)(b)(x)). All are probably caught under GC IV Article 27’s catch all clause of “any form of indecent assault”, or the Grave Breach provisions of that Convention ((Article 147) as torture or inhuman treatment... [or]... wilfully causing great suffering or serious injury to body or health”). Their express inclusion is helpful, and overdue. In a similar, although not identical, vein, 8(2)(b)(xxi) contains the prohibition, from Article 75(2)(b) API of outrages on personal dignity, in particular humiliating and degrading treatment. This is one of the parts of API accepted as customary.<sup>337</sup>

Article 8(2)(b)(xxiv) deals with “intentionally directing attacks against buildings, material, medical units and transport and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law”. This is essentially based on Articles 19(1) GCI, 18(1)(5) GCII, 11(1) API, which are considered to state the

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<sup>331</sup> See Hall *supra* n.102, p.333.

<sup>332</sup> See S. Oeter, *supra* n.315, pp.201-202.

<sup>333</sup> Subjecting persons in the hands of an adverse party to mutilations or scientific experiments not in their interest, and which cause death or seriously endanger health. Based on Article 13, GCIII This is definitely customary, (see Meron, *supra* n.276, p.45)) On experimentation, see H. McCoubrey & M. Gunn, “Medical Ethics and the Law of Armed Conflict” (1998) 3 *J.A.C.L.* 133, pp.147-148.

<sup>334</sup> The latter effectively adds little to Article 8(2)(a).

<sup>335</sup> See T. Meron, “Rape as a Crime Under International Humanitarian Law” *supra* n.271, p.204.

<sup>336</sup> On its customary status see Meron, *supra* n.276, p.46.

<sup>337</sup> Meron, *ibid.* p.65; Greenwood, *supra* n.277, p.103.



customary rule.<sup>338</sup> There are other welcome additions from API such as intentionally directing attacks against civilians, civilian populations or civilian objects.<sup>339</sup> Another provision drawing on that treaty is Article 8(2)(b)(xxv) which provides that, “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.” This is based on Article 54(1) and the core of Article 54(2) of API; both are likely to be customary.<sup>340</sup> The latter part (“wilfully impeding...”) is based on the Security Council’s assertion in relation to Yugoslavia that interference with humanitarian supplies is contrary to Article 23 of GCIV. It is probable that this is not in advance of customary international law, and it is a useful clarification of the law here.<sup>341</sup>

The position of UN personnel raised an interesting issue at the Rome Conference. Some States wanted the inclusion, as a separate crime, of attacks on UN personnel, which had recently been the subject of the 1995 Convention on the Safety of United Nations and Associated Personnel.<sup>342</sup> As the Convention itself may not yet represent customary international law, and there was some opposition to inclusion,<sup>343</sup> a compromise was reached. Article 8(2)(b)(iii) prohibits “intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflicts”. This fulfils a dual purpose. It makes express that these persons are protected by the law, and ensures that the Statute remains firmly grounded in existing international law by limiting protection to when UN personnel are

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<sup>338</sup> Meron, *ibid.* p.45.

<sup>339</sup> Article 8(2)(b)(i)(ii) repeat the Grave Breaches in API Article 85(3)(a) the customary status of which is beyond question.

<sup>340</sup> Greenwood (Rowe), *supra* n.315, p.81.

<sup>341</sup> See Morris & Scharf, *supra* n.148, pp.71-72, and the Security Council action cited therein, (especially Resolution 771).

<sup>342</sup> GA Resolution 49/59. 49 UN Doc. A/RES/49/59.

<sup>343</sup> M. Cottier, *supra* n.288, pp.187-188.

entitled to protection as civilians.<sup>344</sup> Article 8(2)(b)(xxvi) covers “[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate directly in hostilities.” This comes from Article 77(2) API, which is probably customary international law.<sup>345</sup> One limit is in excess of API. That is the limit to “national armed forces”, which was added so it would not cover such militias as the *Intifada*.<sup>346</sup> This has no precedent in international law, and only serves to exempt certain States’ or non State entities’, practices from the scrutiny of the ICC.

A particularly controversial addition to the Statute (for at least two States) was Article 8(2)(b)(viii): “the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory”. This inclusion of this led Israel to vote against the Statute (for obvious reasons)<sup>347</sup> and some commentators to criticise the Rome negotiations as politicised.<sup>348</sup> This provision is based on Article 49(6) of GIV, which represents customary international law.<sup>349</sup> The difference is the addition of “directly or indirectly”. Wedgwood asserts that this may not be a permissible gloss on the GCIV provision.<sup>350</sup> Hafner *et al* respond by taking the narrow view of the “in the framework” phrase, and asserting that it is not ruled out by the Conventions.<sup>351</sup> Their argument does not go far enough. The addition merely makes express an interpretation of the GCIV provision almost universally shared by States. This can be shown in reference to the Israeli policy of settlements (which are an indirect form

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<sup>344</sup> This also ensures that it would be inapplicable to any military enforcement action undertaken under Security Council auspices. As Cottier, *ibid.*, notes it means that it does not criminalise anything not caught under other provisions.

<sup>345</sup> See Meron, *supra* n.276, p.66; Greenwood, *supra* n.277, p.110. J. Kuper, *International Law Concerning Child Civilians in Armed Conflict* (Oxford: OUP, 1997) pp.125, 127. Cottier, *ibid.*, p.259 notes how easy it was to agree inclusion of the crime, although agreeing the minimum age was more difficult.

<sup>346</sup> Arsanjani, *supra* n.103, p.34, Cottier, *ibid.*, p.261.

<sup>347</sup> See Wedgwood, *supra* n.292, p.99 Zimmerman, *supra* n.102, p.191.

<sup>348</sup> see Bolton, *supra* n.320, p.46. (“an excellent example of the politicization of what is masquerading as a purely legal process”) Two comments may be made about this. First, as will be seen, in fact, this formulation is in accordance with international law. Secondly he makes no reference to the US inspired limitations on the law. Bolton, it seems, considers the process “politicized” when the US did not get its way on something.

<sup>349</sup> Zimmerman, *supra* n.102; Meron, *supra* n.276, p.46. For proof of the customary prohibition of deportations prior to this, see T. Meron, “Deportations of Civilians as a War Crime Under Customary International Law” in Meron, *supra* n.142.

<sup>350</sup> *supra* n.292, p.99.

<sup>351</sup> G. Hafner, K Boon, A Rübesame & J. Huston, “A Response to the American View as Represented by



of transfer, as the government does not forcibly transfer its population, but instead makes relocation to the Occupied Territories economically attractive).<sup>352</sup> Over a course of years, the General Assembly has condemned the Israeli policy as contrary to GCIV, in a series of resolutions passed by overwhelming majorities.<sup>353</sup> Thus there is little said in this part of the Rome Statute which has not been said by almost all States before.

The Statute grants jurisdiction over violations of the (customary) 1925 Gas Protocol, insofar as it covers “asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices”.<sup>354</sup> It is almost inconceivable that this provision would not be put in, but there are problems surrounding the inclusion of it. Although the Gas Protocol provides the core of the customary prohibition of chemical weapons, it is incomplete, as there are questions over its application to non-lethal gases such as lachrymose agents or herbicides.<sup>355</sup> In addition, if the narrower interpretation of the “in the established framework of international law” is taken, the possible limitation of the prohibition to first use of chemical weapons could become relevant.<sup>356</sup> Both of these problems would have been overcome had reference been made to the 1993 UN Convention on the Prohibition of the Development, Production and Stockpiling of Chemical Weapons,<sup>357</sup> which prohibits use “under any circumstances” (Article 1(1)) and expressly covers irritants and herbicides. Reference to the 1993 Convention had been made throughout the conference,

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Ruth Wedgwood” (1999) 10 *E.J.I.L.* 108, p.120.

<sup>352</sup> See also E. Benvenisti, *The International Law of Occupation* (Princeton: Princeton U.P., 1993) p.140 refers to the Israeli government as having “planned and nurtured” the settlements.

<sup>353</sup> A. Roberts, “Prolonged Military Occupations: The Israeli Occupied Territories 1967-1988” in E. Playfair, (ed.) *The Administration of Occupied Territories in International Law* (Oxford: OUP, 1992) 25, pp.66-68, for example, cites resolutions 31/106A, 35/122B and 39/95C. For more recent resolutions of a similar nature see GA Resolution 51/133 UN Doc. A/RES/51/133, GA Resolution 52/66, UN Doc. A/RES/52/66, GA Resolution 53/55 UN Doc. A/RES/53/55. The Security Council in Resolution 465 asserted the same point. Controversially, the US voted for, then later claimed the right to retract its vote for the resolution. The US position is that the settlement policy is contrary to Article 49 of GCIV, see Letter of H.J. Hansell, Legal Adviser, Dept. of State to House Committee on International Relations 21 April 1978, (1978) 17 *I.L.M.* 777. On this generally, see Roberts, *ibid.*, especially p.67, asserting that the Israeli policy “was big, planned, encouraged and financed...[and]... quite simply, contrary to international law”. Fenrick, *supra* n.288, p.214 notes that the great majority of States viewed indirect transfer of population to violate GCIV. Von Hebel & Robinson, *supra* n.100, p.112 note that only Israel and “to a certain extent” the US.

<sup>354</sup> Rome Statute Article 8(2)(b)(xviii). Cassese, *supra* n.111, p.152 seems to accept that this could be enough.

<sup>355</sup> Oeter, *supra* n.242, pp.147-148; Cottier, *supra* n.288, p.241.

<sup>356</sup> Due to the large number of reservations relating to second use of such weapons, custom may be that second use is not contrary to law, see McCoubrey, *supra* n p.242; Oeter, *ibid.*, p.149.

<sup>357</sup> 1993 Convention on the Prohibition of the development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, (1993) 32 *I.L.M.* 800, Article 1(5) and preamble. On these provisions see

and its inclusion seemed certain.<sup>358</sup> Its exclusion in the final compromise package was as part of the *quid pro quo* for States who were pressing for the inclusion of nuclear weapons in the Statute.<sup>359</sup> They argued that if nuclear weapons were not included, then nor should the poor States' weapons of mass destruction, chemical and biological weapons.<sup>360</sup> One important reason why these should be in is, unlike nuclear weapons, both chemical and biological weapons are the subject of a long standing express, treaty based prohibition. The compromise excluded all three.

Chemical weapons are, at least, partially covered (by the included parts of the Gas Protocol), but in one of the most significant omissions, (which came about because of the final compromise), biological weapons are not covered at all in the Statute. The omission flies in the face of the prohibition, which was included in the 1925 Gas Protocol, and the comprehensive prohibition in the 1972 Biological Weapons Convention,<sup>361</sup> and being a staple of the Statute from the beginning of the Rome conference.<sup>362</sup> Their exclusion is a serious, unconscionable omission from the Statute. The exclusion of biological weapons is a specific case of a more general malaise in the Statute when dealing with weaponry. There is a crippling conservatism on this matter in the Statute. Article 8(2)(b)(xx) prohibits "employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently

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W. Krutzsch & R. Trapp, *A Commentary on the Chemical Weapons Convention* (Dordrecht: Martinus Nijhoff, 1994) pp.6-19.

<sup>358</sup> See A/CONF.183/2/Add.1 Article 5(c)(o) Options 1,2 & 4; A/CONF.183/2.C.1//L.53, Article 5(o)(v) Options 1 & 2 (these are the only options); L.59, Article 5(o)(v).

<sup>359</sup> See Cottier, *supra* n.288, p.244; Kirsch & Holmes, *supra* n.53, p.7. As he notes, "it was well known, including by the promoters of the inclusion of nuclear weapons, that such a move would permanently deprive to court of essential support and render it powerless" (*ibid.*). This shows another interesting method used by those seeking to undermine the court, by making the prohibitions so strong that they were unacceptable to others. The inclusion of nuclear weapons was an incredibly controversial part of the conference, particularly as the ICJ opinion was, basically, inconclusive on the matter (*supra* n.315; See D Akande, *supra* n.315; D Kritsiotis, "The Fate of Nuclear Weapons After the 1996 Advisory Opinions of the World Court" (1996) 1 *J.A.C.L.* 95), States on both sides could plead it in aid. (for earlier discussion on legality see I. Pogany (ed.) *Nuclear Weapons and International Law* (Aldershot: Avery, 1987); G. Schwarzenberger, *The Legality of Nuclear Weapons in International Law* (London: Stevens & Sons, 1958); N. Singh & E. McWhinney, *Nuclear Weapons and Contemporary International Law* (Dordrecht: Martinus Nijhoff, 1989)).

<sup>360</sup> Cottier, *ibid.* On the controversies see von Hebel & Robinson *supra* n.100, pp.113-116, especially p.116.

<sup>361</sup> 1972 UN Convention on Prohibition of the Development, Production and Stockpiling of Bacteriological, Biological and Toxin Weapons and their Destruction, 1015 UNTS 164. It does not expressly mention use, but clearly implies it see Green, *supra* n p.131.

<sup>362</sup> See A/CONF.183/2/Add.1, Article 5(o)options 1, 2 & 4 (iv); A/CONF.183/C.1/L.53 Article 5(o) options 1 & 2 (v); L.59 Article 5(o)(v).



indiscriminate in violation of the international law of armed conflict, provided that such weapons are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in Articles 121 and 123.” The prohibition of unnecessary suffering is a cornerstone of humanitarian law, underlying many of the particular rules, and being, in itself a customary law prohibition on such methods or weapons.<sup>363</sup> The prohibition does not only apply to those particular instances, such as have been defined by treaty, for example the Gas Protocol.<sup>364</sup>

Unfortunately the Rome Statute turns this on its head. By requiring the pre-requisites of a comprehensive prohibition and inclusion in the annex for the specific methods, weapons etc. with a prohibitively high threshold for addition,<sup>365</sup> States have essentially robbed the phrase of any autonomous meaning. It is limited to only what States have, in particular instances, specified as covered by the general phrase. This amounts to a radical inversion of the concept. Essentially, States have refused to pass to the court any power to declare any weapons as contrary to the provision, keeping all the power over the possibly controversial application of the general principle to themselves.<sup>366</sup> Although this provision makes the outlook for the prohibition of weapons look bleak, it must not be forgotten that even if the use of a weapon is not expressly forbidden in the Statute, it will still come under the jurisdiction of the ICC if it is used in a manner such that it falls under the other provisions.

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<sup>363</sup> In addition to the customary 1868 St Petersburg Declaration, Article 23(e) Hague Rules contains the prohibition and is undoubtedly customary. See Oeter, *supra* n.242, pp.111-116; H. McCoubrey, “Mines, Lasers and Unnecessary Suffering” (1995) 2 *I.L. & A.C.C.* 33; Note that the Rome language here in one respect is forward looking, altering “calculated to cause” to “of a nature to cause”. This development is rendered nugatory by the rest of the definition.

<sup>364</sup> This was the position of the ICJ in the *Nuclear Weapons Case*, *supra* n.315, paras 78, 85, see Kritsiotis, *supra* n.359, p.109.

<sup>365</sup> Cassese, *supra* n.111, p.152 states that due to the threshold it seems unlikely that any weapons will be included.

<sup>366</sup> The interpretation of the general principle is not easy or uncontroversial, and the possible implications of a determination by a tribunal that such a weapon falls within the prohibition are huge. For example if the ICTY (not limited as the ICC is here) were to declare that landmines were illegal as violating this principle, the repercussions for States, the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1999 UKTS 18 (and the ICTY) would be huge. The debate on particular weapons, such as landmines, blinding laser weapons, was controversial, see Wedgwood, *supra* n.292, pp.98-99. Arsanjani, *supra* n.103, pp.34-35 notes that many States were dubious about an open ended provision here, preferring to limit it.

As mentioned above, the Rome Statute does not restrict itself to international conflicts, but also provides for the prosecution of certain war crimes committed in internal armed conflict. The inclusion of provisions relating to internal armed conflicts was controversial, at least for prohibitions extending beyond Common Article 3.<sup>367</sup> That said, the matter was far less controversial than it would have been ten years ago. The creation of the ICTR expressly for internal armed conflict, together with the *Tadic* jurisdiction judgment have revolutionised the law in this area, making some kind of provision almost inevitable.<sup>368</sup> Given the level of acceptance, and support for inclusion of Common Article 3, its presence (in Article 8(2)(c)) is unsurprising, but no less helpful for that. It is clearly custom, and probably *jus cogens*,<sup>369</sup> thus its inclusion is entirely legally warranted.

One limit not express in Common Article 3, but included in the Rome Statute is present in Article 8(2)(d) which adds, to the Common Article 3 standard of “armed conflicts not of an international character” the following: “and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”. This language is taken from Article 1(2) APII, not Common Article 3. APII is traditionally seen as having a higher threshold of applicability. It does, but the higher threshold comes from Article 1(1) of APII which requires the insurgent force to be under responsible command, and control territory such that they can implement the Protocol and carry out sustained and concerted military operations. The language in Article 8(2)(d) probably adds little to the requirement of “an armed conflict not of an international character”.<sup>370</sup>

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<sup>367</sup> For pre-Rome see Zimmerman, *supra* n.102, pp.196-197; Hall, *supra* n.102, p.336; for the controversy at Rome see Kirsch & Holmes, *supra* n.53, p.7.

<sup>368</sup> On *Tadic* see Politi, *ibid.*, also see Meron, (continuing Role) *supra* n.271, p.269 “a constructive evolution toward the blurring of the dichotomy between and internal armed conflicts.”

<sup>369</sup> See Zimmermann, *supra* n.288, p.288.

<sup>370</sup> For the criteria used by the ICRC to determine the existence of such a conflict, see J. Pictet (ed.), *Commentary to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the*



Although the inclusion of Common Article 3 in the Rome Statute was not particularly controversial, the same cannot be said for the inclusion of “the laws and customs applicable in armed conflicts not of an international character”. One of the major obstacles to recognition of customary law here has been the widely held view that APII, the only treaty solely dealing with the law of non international armed conflict, does not represent customary international law.<sup>371</sup> This view is by no means universally accepted: for example, *Tadic* is diametrically opposed to this position, because the Appeals Chamber asserted that “many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else having been strongly instrumental in their evolution as general principles”.<sup>372</sup> The *Tadic* view is at least partially correct, as Matheson said in 1987: “the basic core of Protocol II is, of course reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law”.<sup>373</sup> That said, the first authoritative announcement of rules of customary international law applicable to non-international armed conflicts came in the *Tadic* case.<sup>374</sup> The effect of this case in the garnering of support for this category of offences cannot be overestimated. The inclusion of offences occurring in internal armed conflict but not under Common Article 3 is a positive step. This inclusion occurs in Article 8(2)(e), which grants the ICC jurisdiction over “serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law...”. A closed list of 12 violations follows, many of which are “parallel or identical” to those in

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*Field* (Geneva: ICRC, 1952) p.49.

<sup>371</sup> See, for example, Cassese, *supra* n.315, p.109-110.

<sup>372</sup> *Tadic* AR72 *supra* n.139, para 117.

<sup>373</sup> M.J. Matheson, “Remarks” (1987) 2 *A.U.J.I.L. & Policy* 419, pp.430-431. This is concurred with by, e.g. Ratner & Abrams, *supra* n.4, p.95, Meron, *supra* n.276, p.72; Greenwood, *supra* n.315, pp.112-113 R. Abi-Saab perhaps goes the furthest, claiming that “the rules laid down in Protocol II develop and complete those in Common Article 3. It could be regarded as an “authentic interpretation” by the diplomatic conference on the content of common article 3”. R. Abi-Saab, “Human Rights and Humanitarian Law in Internal Conflicts” in D. Warner (ed.) *Human Rights and Humanitarian Law: The Quest for Universality* (The Hague: Martinus Nijhoff, 1997) 107, p.113.

<sup>374</sup> Although the Leiber Code was in force during the US Civil war, in that particular conflict there had been a recognition of belligerency, thus the conflict was more akin to an international conflict. See L. Moir, “The Historical Development of Humanitarian Law in Non-International Armed Conflicts to 1949” (1998) 47 *I.C.L.Q.* 337, pp.338-350.

Article 8(2)(b).<sup>375</sup> These violations are said to come under the jurisdiction of the ICC, as for Article 8(2)(c) not when part of riots etc. In addition to these requirements Article 8(2)(e) is said to apply only to “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”<sup>376</sup> This is, in all likelihood, a correct formulation of the customary test,<sup>377</sup> which is broader than that enunciated in APII. APII also requires that an insurgent group controls territory, and is limited to conflicts between governments and insurgents.<sup>378</sup>

The acts included in Article 8(2)(e) must also be evaluated. 8(2)(e)(i) prohibits (like 8(2)(b)(i)) intentionally attacking civilian populations. This provision is beyond doubt customary, it is implicit in Common Article 3 (1)(a), Article 4 APII, and express in Article 13(2) APII. It was also declared customary (with adequate support) in *Tadic*.<sup>379</sup> Article 8(2)(e)(ii) prohibits (in a parallel provision to 8(2)(b)(ii)) intentionally targeting buildings, etc. using the Geneva Convention emblems.<sup>380</sup> It is likely that this is in accordance with custom. In Somalia the commander of UNOSOM accepted that hospitals, etc. were generally not legitimate targets, even though APII did not apply as there were no government forces in the field.<sup>381</sup> As in international conflict, UN personnel are protected so long as they are entitled to civilian status.<sup>382</sup> As discussed above in relation to international armed conflicts this can be justified as they are considered civilians. In relation to practice, it is clear that killing of peacekeepers in internal conflict is a crime under customary international law. The Security Council, in resolution 837<sup>383</sup> mandated the Secretary-General to arrange for the trial of those killing peacekeepers, and no protest

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<sup>375</sup> Arsanjani, *supra* n.103, p.32. This is an answer to Cassese’s criticism that the Statute is retrogressive in not providing for a common core of law applicable to both types of conflict (*supra* n.111, p.150). The Statute does, they are merely placed in different sections. This does not alter their nature.

<sup>376</sup> Rome Statute Article 8(2)(f).

<sup>377</sup> It adopts, almost verbatim, the test enunciated in *Tadic* AR72, *supra* n.139, para 70.

<sup>378</sup> Article 1(1) APII, see McCoubrey, *supra* n.239, p.257. This was an unfortunate lacuna, which the Rome Statute does well to address.

<sup>379</sup> *Tadic* AR72, *supra* n.139, paras 100-102, 110-113.

<sup>380</sup> This is contrary to Article 9(1), 11(1) & 12 APII.

<sup>381</sup> McCoubrey, *supra* n.239 p.263. Also, attacking a hospital would in all likelihood amount to attacking a non military objective, which is contrary to customary law, see Cassese, *supra* n.315, p.105.

<sup>382</sup> Article 8(2)(e)(iii).



has accompanied Belgium's assertion of universal jurisdiction over the killings of its peacekeepers in Rwanda.<sup>384</sup> Article 8(2)(e)(iv) is identical to Article 8(2)(b)(ix). For hospitals and "places where the sick and wounded are collected" it is customary as described above. Also to the extent that the rest overlaps with the 1954 Hague Convention of Cultural Property, it may be accepted as custom.<sup>385</sup>

Pillage is forbidden, both by the customary law of internal armed conflicts,<sup>386</sup> and the Rome Statute (Article 8(2)(e)(v)). Sexual offences are dealt with in Article 8(2)(e)(vi) in a similar way to 8(2)(b)(xxii), the only difference being that the final part substitutes "article 3 common to the four Geneva Conventions" for "a grave breach of the Geneva Conventions". As the reference implies, this is little more than an elaboration of the customary standard in common Article 3,<sup>387</sup> thus unobjectionable from that point of view and an important addition to the Rome Statute. Given the universal condemnation of the practice of "ethnic cleansing" in former Yugoslavia,<sup>388</sup> which was not necessarily an international conflict, it is probably acceptable to claim that Article 8(2)(e)(viii), which covers "[o]rdering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand" is based on widely accepted custom.<sup>389</sup> One of the more controversial aspects of the *Tadic* decision was its inclusion of perfidy in its survey of the rules applicable to internal armed conflict.<sup>390</sup> It has, nonetheless been included in the Statute, in 8(2)(e)(ix) (which uses the Hague Rule formulation of "killing or wounding treacherously a

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<sup>383</sup> SC Resolution 837, UN. Doc. S/RES/837.

<sup>384</sup> The reason for the withdrawal of the indictment in the *Ntuyuhaga* Case was that Belgium wished to try him.

<sup>385</sup> This convention applies irrespective of the classification of the conflict. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240 Article 19. In addition see *Tadic*, *supra* n.139, para 127.

<sup>386</sup> The prohibition of pillage is expressed in Article 4(2)(g) APII, which Greenwood considers customary, *supra* n.277, p.113.

<sup>387</sup> Rape, enforced prostitution and indecent assault are mentioned in Article 4(2)(e), which is viewed as an elaboration of Common Article 3 (see Greenwood, *ibid.*). On the other acts, see above, at the very least they would all come under Common Article 3's prohibition of outrages on personal dignity, humiliating and degrading treatment, or cruel treatment.

<sup>388</sup> See D. Petrovic, "Ethnic Cleansing: An Attempt at Methodology" (1994) 5 *E.J.I.L.* 342.

<sup>389</sup> The language itself is taken from Article 17 APII, which the pre-Yugoslavia literature had not accepted as customary, due to the lack of practice (Greenwood, *supra* n.171, p.113). Yugoslavia probably supplied that practice. In addition see *Tadic*, *supra* n.139, para 111-112, on GA Resolution 2675 UN Doc. A/8028, p.75, which prohibits such transfers.

<sup>390</sup> Greenwood, *supra* n.171, p.129.

combatant adversary”). Of almost certain customary status is the prohibition in Article 8(2)(e)(x). This is the prohibition of mutilations or non-therapeutic medical/scientific experimentation. This can be seen as an elaboration on Common Article 3(1)(a) (the prohibition of violence to life and person, mutilation and cruel treatment), not least as it is clearly covered by Article 4(2)(a) APII.

Article 8(2)(e)(vii) prohibits “conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities”. It is probable that this article is reflective if not of long established custom, then the emergence of a recent consensus, at the latest at the Rome Conference, that under 15s are not to be used in armed conflicts.<sup>391</sup> The denial of quarter is criminalised by Article 8(2)(e)(x). There is little to go on in determining the customary or otherwise nature of this prohibition, but the ICTY in *Tadic* clearly alluded to this being the position under customary law.<sup>392</sup> “Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded but the necessities of the conflict” is included in the jurisdiction of the court by virtue of Article 8(2)(e)(xii). The customary nature of this prohibition in non-international armed conflicts has never been fully discussed. It may be thought that such a position could be extrapolated from the *Tadic* opinion,<sup>393</sup> but that may be reading that opinion too widely. Equally, as the rule concerned is one with at least nearly a century of applicability in international conflict and which is based on the avoidance of unnecessary destruction, it is likely that if the question

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<sup>391</sup> On the possibility of treaty drafting giving rise to custom see Cassese, *supra* n.315, p.60. See, also, for example, 1989 Convention on the Rights of the Child, (1989) 28 *I.L.M.* 1448, Article 38; ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Adopted by the Conference at its Eighty-Seventh Session, Geneva 17 June 1999. In S/PRST/1998/18, the Security Council “strongly condemn[ed]...recruitment and use in hostilities [of children] in violation of international law, and call[ed] upon all parties concerned to put an end to such activities”, this may show an acceptance that the use of under 15s in conflict is in contravention of international law, the Council continued, and “call[ed] upon all parties concerned to comply strictly with their obligations under international law, in particular their obligations under the Geneva Conventions...the Additional Protocols...and the UN convention on the Rights of the Child, [and] stress[ed] the obligation of all States to prosecute those responsible for grave breaches of international humanitarian law.”. The use of “in particular” implies that there is other (customary) international law on the subject.

<sup>392</sup> *Tadic* AR72 *supra* n.139, para 102, they mention this as contained in Mao Tse-Tung’s orders to his army in the Chinese Civil war.

<sup>393</sup> *Tadic*, AR72 *ibid.* also mentions that Mao Tse-Tung ordered the insurgents not to “damage crops”.



were to arise before a court, it would accept that the rule was applicable in internal conflicts by virtue of custom.

What is more important in relation to the provisions covering internal armed conflicts though, is what is not included. The *Tadic* case devoted a large amount of space to displaying how the law on the means and methods of warfare had developed in custom for internal armed conflicts, with specific reference to the prohibition of chemical weapons.<sup>394</sup> None of this is included in the Rome Statute.<sup>395</sup> This is a serious omission, as it is in the case of international armed conflict, but here there is not even an analogous provision to Article 8(2)(b)(xx). As the *Tadic* case asserted, “elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their territory. What is inhumane and consequently proscribed, in international wars cannot but be inhumane and inadmissible in civil strife”.<sup>396</sup> Similarly unjustifiable absences in the Rome Statute in the provision for international armed conflicts do not excuse their exclusion here. Finally, there is no provision relating to indiscriminate attacks or collateral damage. It is clearly not the case that customary international is silent on this matter,<sup>397</sup> and modern internal conflicts are replete with examples of civilians being caught up in fighting. These absences are exacerbated by the fact that most modern conflicts are internal, and it is in these conflicts that conduct is in need of limitation.

## CONCLUSION ON WAR CRIMES

The provisions relating to war crimes occur at the sharp end of the definitional debates, as war crimes are the international crimes which it is the most likely that State representatives may commit. Even democratic States, with well disciplined armies, are

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<sup>394</sup> *Ibid.*, paras 119-127.

<sup>395</sup> For criticism see Cassese, *supra* n.111, pp.152-153.

<sup>396</sup> *Tadic*, AR72 *supra* n.139, para 119.

<sup>397</sup> See Cassese, *supra* n.315, p.105, *Tadic*, *ibid.*, para 127.

likely to have to deal with some actions of their forces or representatives which could come under the prohibitions in the laws of war. Liability for war crimes does not depend upon the widespread/systematic/policy driven elements of crimes against humanity, nor do they have the specific intent requirement of genocide. Thus their commission can occur without State support or acquiescence to a far greater extent than the other two crimes. The Nuremberg and Tokyo Charters both displayed a high degree of faith in the ability of the Tribunals to determine what the laws and customs of war prohibited. These charges were the least controversial in terms of existing international law. Unlike the other two substantive offences contained in the London and Tokyo Charters, these had a clear background in international law. This should not occlude the fact that the Allies were prepared to promulgate a very vague definition, leaving a wide discretion in the Tribunals to declare what amounted to war crimes.<sup>398</sup> A similar approach was taken by the Secretary-General (i.e. by the OLA) in respect of the ICTY. Again an illustrative list was given (in Article 3).<sup>399</sup> The discretion inherent in an open list has been fully used in the ICTY, in particular in the *Tadic* case.<sup>400</sup> Those States drafting the ICTR Statute, whilst taking a fairly broad view of the criminality of the laws of war applicable in internal armed conflicts (which they were justified in doing) reigned in the ICTR more, by limiting it strictly to violations of Common Article 3 and APII.

By far the most detailed provision on war crimes, albeit in a closed list, is given in the Rome Statute, where States, as they were to come under the jurisdiction of the ICC themselves,<sup>401</sup> were entirely unwilling to grant the ICC any power to determine what conduct amounts to a war crime when it is possible that it could use that law against their own nationals. It is also noteworthy that the list is almost all demonstrably within

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<sup>398</sup> To a certain extent, of course, this was limited by what the Prosecution (who were controlled by the Allied governments) were prepared to contend were war crimes.

<sup>399</sup> A closed list was, of course given in Article 2, but as there was also the open list in Article 3. The existence of another, closed list in the same document does not remove the broader power in the open list, to declare what amounts to a war crime. The list of war crimes included in the ICTR Statute must be considered, for the most part, an afterthought.



customary international law, indeed many of the provisions are open to the criticism that they are more narrowly drawn than customary international law provides, particularly in relation to targeting, i.e. in one of the few areas where the law is clearly important to air campaigns. It is also the case that the list is woefully inadequate in relation to prohibited weapons, where the Statute is manifestly remiss in not providing for the prohibition of certain weapons whose prohibition is beyond doubt a part of customary international law. As this is a definition which, for the foreseeable future, the Rome Court will be stuck with, this is a cause for great concern.

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### OTHER CRIMES

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Before the Rome conference there was only one other crime included in an international criminal court. This was the provisions on criminal organisations placed in the London Charter.<sup>402</sup> By virtue of these, any organisation declared criminal by the Nuremberg IMT was to be considered so by the signatories to the Charter, who then had a right to bring any person to trial and convict them purely for membership in that organisation (Article 10). It is undisputed that there was no precedent or basis for this in international law.<sup>403</sup> Its addition was a practical response (so the authors of the Charter thought)<sup>404</sup> to the large scale criminality which surrounded the Nazi regime. The IMT itself accepted that this was new, and approached it with great caution, describing it as “a far reaching and novel procedure. Its application, unless perfectly safeguarded, may

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<sup>400</sup> To a certain extent, of course, the ICTY will have to stay within the bounds of what the Prosecution assert to be war crimes within the ICTY's jurisdiction, but here, there is a large difference to the Nuremberg and Tokyo Prosecutions. The ICTY OTP is an independent, international body, not subject to governmental control.

<sup>401</sup> Unless, they opt-out of the war crimes provisions, for a period of seven years, by virtue of Article 124.

<sup>402</sup> London Charter, Articles 9 & 10. See S. Pomorski, “Conspiracy and Criminal Organisations” in Ginsburgs & Kudriavtsev, *supra* n.57, 213; Woetzel, *supra* n.57, pp.190-217.

<sup>403</sup> See J.F. Murphy, “Norms of Criminal Procedure at the International Military Tribunal” in Ginsburgs & Kudriavstev, *ibid.*, pp.68-69.

<sup>404</sup> For a highly critical view of the Allies' later actions relating to denazification see T. Bower, *Blind Eye to Murder* (London: Little Brown & Co., 1995) *passim*.

produce great injustice.”<sup>405</sup> As a result, they tailored their findings so to ensure proof of voluntary membership and knowledge of criminal purposes for a conviction to be recorded in any national proceeding.<sup>406</sup> They also acquitted three of the six indicted organisations.<sup>407</sup>

Despite the (arguably) analogous organisations in Japan (primarily the *Kempetai*),<sup>408</sup> no such provision was included in the Tokyo Charter. There was one proposal to include organisational criminality in Rome,<sup>409</sup> it received very little support and was quite rightly dropped.<sup>410</sup>

In relation to the permanent court, the possibility of other crimes was on the table from the beginning. It must be remembered that the initial revival of the idea was by the Caribbean states looking for a court to act against large scale drug traffickers.<sup>411</sup> The original ILC drafts all focused on other crimes, in addition to the core crimes, which at times seemed rather sidelined.<sup>412</sup> At the pre-Rome PREPCOMs the developing countries argued strongly for the inclusion of drug trafficking and terrorism in the jurisdiction of the court.<sup>413</sup> One reason for the non-inclusion of terrorism was fairly simple: there is, as yet no clearly acceptable definition of such an international crime in customary international law (or treaty law).<sup>414</sup> It is interesting that this argument did not prevail in

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<sup>405</sup> Nuremberg IMT judgment, *supra* n.4 p.250. See generally Lippman, *supra* n.37, p.35, Schwarzenberger, *supra* n.57, p.506.

<sup>406</sup> *Ibid.* p.251.

<sup>407</sup> The SA, Reich Cabinet and High Command. They convicted the SS, Leadership Corps of the Nazi party and the Gestapo/SD, *ibid.*, pp.268-271.

<sup>408</sup> On which see Y. Tanaka, *Hidden Horrors, Japanese War Crimes in World War II* (Boulder: Westfield, 1998) pp.26-27.

<sup>409</sup> A/CONF.183.C.1/L.3.

<sup>410</sup> The primary, and fatal criticism of the idea is, as the Nuremberg IMT correctly identified (IMT Judgment, *supra* n.4, p.250), it is very questionable on grounds on individual liability, and is open to abuse. See K. Ambos, “Article 25” in Triffterer (ed.), *supra* n.102, 475, p.478.

<sup>411</sup> R.S. Lee, “Introduction” in Lee (ed.), *supra* n.100, 1, p.2.

<sup>412</sup> See J. Crawford, “The ILC’s Draft Statute for an International Criminal Tribunal” (1994) 88 *A.J.I.L.* 140, pp.143. See also Levie, *supra* n.99, p.8, who declares that any permanent court must also have piracy, slavery, terrorism, hijacking, and drug crimes; K. Ambos, “Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law Viewpoint” (1996) 7 *E.J.I.L.* 519, p.524, who worries about trivialising the court, by having, e.g. trafficking in obscene materials.

<sup>413</sup> See Politi, *supra* n.102, p.122. Boister, *supra* n.55, p.27.

<sup>414</sup> This remains the case despite the 1997 International Convention on Terrorist Bombings, (GA Resolution 52/164, UN Doc. A/RES/52/164), which is not yet in force, never mind reflective of customary international law.



the debate on aggression. A better argument against its inclusion is that terrorism, is not, currently, criminal under international law as an autonomous crime.

The arguments on drug trafficking were different. The developed countries (in general) were strongly against the inclusion of drug trafficking in the Rome Statute.<sup>415</sup> The primary reason for exclusion of drug trafficking was probably not legal (although its opponents did place their arguments in legal form),<sup>416</sup> but because the existing system of national obligations to extradite or prosecute enshrined in the 1988 Vienna Convention privileges their interests.<sup>417</sup> Due to the opposition of many States, and the possibility that the Court could be “swamped” with cases better left to national jurisdictions, it is probably better that drug trafficking was not included.<sup>418</sup> Due to the strength of support for them though, both drug trafficking and terrorism were included in the Final Act of the Rome conference as possible additions to be considered at any review conference.<sup>419</sup>

## CONCLUDING REMARKS

Having considered the jurisdictional competence of international criminal tribunals, the trends suggested above are more than evident. Let us take the Tribunals in turn. First the Nuremberg and Tokyo IMTs. For the offences included, with the exception of the war crimes charges, it can be seen that the Allies engaged in a “tendentious reading of international law”.<sup>420</sup> Crimes against humanity, although morally clearly justifiable, were at best an emerging principle during WWII, and it is very unlikely that crimes against peace

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<sup>415</sup> The US was express about this, see Scheffer, *supra* n.53, p.13.

<sup>416</sup> One such argument was that the crimes in the 1988 Vienna Convention were too vague (see Boister, *supra* n.55, p.33) the answer to which is that the conference was capable of drafting definitions, there was the 1988 definition, which had been incorporated nationally without alteration by many States (See Boister, *ibid.* p.32).

<sup>417</sup> Boister, *ibid.* p.36. With remarkable frankness, Scharf (a former US State Department lawyer) admits that the US opposition to the inclusion of drug crimes came at least partially from the US Justice Department, who did not wish to lose the revenue they received as a result of expropriation of drug related moneys, M.P. Scharf, “The Politics of Establishing an International Criminal Court” (1995) 6 *Duke J.C. & I.L.* 167, p171.

<sup>418</sup> Cassese, *supra* n.111, p.146 describes the decision as “wise”.

<sup>419</sup> Final Act of the Rome Conference, C/CONF.183/10 Annex I Resolution E. See Kirsch & Holmes, *supra* n.53, p.7, Arsanjani, *supra* n.103, p.30.

<sup>420</sup> Chaney, *supra* n.243, p.75.

were referable to existing international law. The Tokyo IMT went even further, defining crimes against humanity in such a broad way as to be subversive of the entire laws of armed conflict, and even the Allies' hand picked judges refused to follow the dictates of the Tokyo Charter. When it came to the principles of liability and defences, the Charters' provisions existed solely to expand the former and deny the latter. Beyond these, discretion was left in the court to determine, for example, what the laws and customs of war entailed. As there was no Axis government capable of effectively resisting the imposition of the IMTs' Charters, the Allies clearly felt able to decide precisely what the law they wished to use to prove the guilt of the Axis persons in their control. Their attitude towards the promulgation of the Charters was simply speaking, "pass first, ask (legal) questions later".

When the ICTY was set up, slightly different policies were afoot, although again, none of those involved in creating the ICTY were likely to be subject to its jurisdiction. Because of this the Security Council was happy enough to leave the drafting of the law to a third party, the Secretary-General (i.e. the OLA) (although they retained influence by giving their suggestions). Here it is not simple to see if there was a wide view taken of the law or not. The law at the time, with the exception of the settled definition of genocide, was the subject of some debate. As a result, the Secretary-General, perhaps not wishing to include anything which could be considered as taking sides on various parts of definitional debates, simply left most decisions to the ICTY itself, allowing the ICTY to decide, and be the "laboratory" of the law.<sup>421</sup> This is not only the case for the defences and principles of liability the Secretary-General noted, but also, and very importantly, the laws of armed conflict by virtue of the open-ended Article 3. As the Security Council members were not concerned about the ICTY working against their nationals (or indeed, some might say, at all), they were happy to leave the decisions on the applicable law to the Court, in a similar way as they had been happy to leave it to the Secretary-General. They

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<sup>421</sup> See P. Rowe, "Duress as a Defence to War Crimes After Erdemovic: A Laboratory for a Permanent Court?" (1998) 1 *Y.B.I.H.L.* 210, pp.225-228.



were happy to adopt the Statute, leaving many questions begging, and limit themselves to suggestions, even where they disagreed with the law in the Statute, as evidenced by the US positions on superior orders.

With the ICTR, again there was a different context because this time the definers were States, and one of those asked for its comments was the State over which the ICTR was to have jurisdiction (even though the government was the successor government to that which perpetrated the genocide). In addition, as it was to be linked to the ICTY (by the common Appeals Chamber) differences in the law not warranted by the different situations (Rwanda being considered a civil war, Yugoslavia of uncertain classification) were best avoided. The classification of the Rwandan conflict as non-international, for example explains why express reference was made to Common Article 3 and APII in the ICTR Statute. Even so, criminalising these provisions involved an enlightened view of the law, but there are important differences between the approaches taken in the Statutes beyond this. The ICTR Statute does not have an open-ended provision like Article 3 of the ICTY Statute, thus there is far less power in the ICTR to develop the law. This is related to the second point. The ICTR war crimes provision (Article 4) is not, and is not intended to be, reflective of customary international law (at least as far as it relates to APII). This means that the judgments issued by the ICTR are not of such universal relevance as those of the ICTY relating to the customary law of armed conflicts.

Here the US's ideas that Article 3 of the ICTY Statute covered all the applicable law in former Yugoslavia came through in the ICTR Statute, with the difference that they did not intend it to relate to custom to nearly the same extent. The (probable) imprint of the US can also be seen in the higher threshold given to crimes against humanity in the ICTR Statute, which corresponded to their suggestion to the Secretary-General for inclusion in the ICTY Statute. Rwanda, as may have been expected, voted against the ICTR Statute as it included crimes other than genocide, ostensibly on the ground that the ICTR should not waste its resources prosecuting such offences. In reality, this was more to do with

the new government wishing to ensure that offences committed by them (as the RPF) which were thought to amount to war crimes or crimes against humanity, were not included in the mandate of the ICTR. As Rwanda did not have the power to prevent the creation of the ICTR, its view was not taken up. Even though the drafters of the ICTR Statute did not take up the Rwandan government's view, it is notable that there have been no trials of RPF members before the ICTR, which needs the co-operation of Rwanda for the discharge of its mandate in regard to genocide charges against the old Hutu regime.

The Rome Statute was where the true attitudes of States were shown. Here States were not merely setting down law to deal with anyone else, but law that applied to themselves and their allies. Also, this law is to be enforced by a court who is to be independent of the creating States. This meant that the way to rein in the court was by ensuring that all the law to be enforced was defined by the States themselves, leaving as little discretion as possible in the Court itself. This setting down of the law need not necessarily be unwelcome, primarily because parts of international criminal law had, at least up until recently, been rather open-textured, and without authoritative interpretations, were low in legitimacy.

The problem with the Rome Statute is that definitions of crimes are sometimes narrower than customary international law permits (or, in some cases, requires). This is particularly the case for war crimes, where with the closed list of frequently limited definitions. As Cassese notes, the drafters seemed fully aware of the more limited nature of the definitions in the Rome Statute, including in Article 10 the provision which is intended to deny the Statute any impact on the development of customary international law.<sup>422</sup> Cassese is correct; it seems clear that the Statute sets up what is intended to be a parallel regime, which presumes a large overlap between that law and the pre-existing customary regime.<sup>423</sup> The problem lies in the fact that there is, at least at the present time, several parts of the law of the Statute which are clearly in retrogression from customary

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<sup>422</sup> Cassese, *supra* n.111, p.157.



international law.<sup>424</sup> In addition, the two sets of law reintroduce some confusion into the law, obviating the gains in legitimacy from the codification, as international criminal law was achieving a coherent form through the judgments of the two UN Tribunals.

This may be a problem now, but the long-term aspect is a problem in another way. It is likely that the gap between the two sets of law will become smaller, not because the Statute is brought into line with customary international law, but because it is likely that the Rome Statute definitions will come to represent customary international law. This may come about as the definitions of the Statute and decisions of the Court are likely to be accepted as precedents,<sup>425</sup> and the definitions of crimes are likely to be those incorporated into national law by signatories to the Rome Statute. The cost of increased legitimacy in there being a codified body of law is offset by (for the time being) the two sets of law set up, and (both now and later) the clear limitation of liability included in the Statute as a result of the demands of certain States, in which others were prepared to acquiesce.

Overall, a clear parallel can be seen to the problem of selectivity in national jurisdictions, where the law is expressly made to apply solely to those not associated with the current elite, or the crimes are defined in such a way as to exclude the criminality of those persons. On the international stage, a far wider view have been taken of the law by States when the application of that law will be limited to others. This is particularly in evidence in the Nuremberg and Tokyo IMTs, where, in particular the crimes against peace charge was in advance of existing law, and could, if unrestricted, inculcate at least one of the prosecuting nations. It is also present in the ICTY, where large discretion is given to the ICTY to determine the law, a power States have been entirely unwilling to

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<sup>423</sup> *Ibid.*

<sup>424</sup> As Cassese notes, *ibid.* if the Statute is ambiguous, the Court is entitled to apply general international law, the problem is, that in many areas the Statute is not ambiguous, and, as Cassese says, (*ibid.*) the Statute is paramount for the Court.

<sup>425</sup> Cassese, *supra* n.111, p.158.

grant to tribunals which have jurisdiction over their nationals.<sup>426</sup> Although the ICTR's discretion is bounded, it is still there, especially in relation to crimes against humanity, liability and defences. Also a progressive view of the criminality of violations of the law applicable in internal conflicts was taken. The voting on the ICTR is also probative, with the Rwandan government doing its best to exempt itself from liability in the ICTR by supporting removal of crimes which they may have committed from the jurisdiction of that court.

The Rome Statute is the clearest evidence of the selectivity by definitional restraint. The Rome Statute is capable of acting against the nationals of all signatories, and for offences on its territory. As may be expected, a moderately conservative view of the law was taken, certainly more conservative in relation to the *lex lata* than had been taken for any of the other international tribunals. Certain provisions are clearly more narrowly drawn than custom, and there are some unconscionable omissions. The discretion of the ICC was deliberately taken to the lowest extent possible, to prevent the court from independently appraising the law. With the addition of the defences as discussed above, it is difficult to avoid the conclusion that the law, in particular in relation to war crimes, has been structured to minimise the possibility of conviction on some counts. These include those of most relevance to major powers, whose airforces are even less regulated than in customary law. That is not all though, States have, as a result of extraordinary cynicism on the part of many powers, left themselves free to utilise many weapons clearly illegal, to all intents and purposes, with impunity.

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<sup>426</sup> As McCoubrey said, in relation to the 1994 ILC Draft statute, which had a definition similar to that in the Tokyo IMT Charter, "Whether quite so open ended a 'definition' could now be considered adequate, especially in so politically sensitive an area, must... be considered debatable" McCoubrey, *supra* n.246 p.9.



# CHAPTER 6: SELECTIVITY IN THE LAW 2: DEFENCES AND THE GENERAL PRINCIPLES OF CRIMINAL LIABILITY

## INTRODUCTION

As can be seen, the attitudes of States are made clear through the definitions of crimes. This is also the case for defences and the “general part” of criminal law.<sup>1</sup> This should come as no surprise, after all, both definitions and the general part are essentially part of the same process, that of determining criminal liability. The creators of international criminal courts have consistently taken a wider view of liability (and consequently, a narrower view of applicable defences) or have been happy for the court to determine the principles when there is a separation of the authority between the creators and the subjects, and *vice versa* when there is no such separation. To illustrate this, it is worthwhile to examine both defences and principles of liability. National jurisdictions have also been selective in both over-and under-inclusive ways, depending on who is on trial.

Examples of this at the national level come from Argentina and the US. In Argentina, when prosecutions became politically inexpedient, two measures were taken: a time bar was imposed, then, to ensure all ongoing cases were brought to a close, the *Ley de*

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<sup>1</sup> M.C. Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for Yugoslavia* (New York: Transnational, 1996), p.339 defines the “general part” as “(1) definitions of the terms used in the special part of the statute; (2) constitutive elements of the crimes which include definitions of the material, mental and causal elements; (3) definitions of inchoate offences, such as attempt, solicitation and conspiracy; (4) conditions of exoneration, such as excuses and justifications; and (5) factors to be considered in mitigation of punishment, as well as additional remedies, such as compensation for victims.”

*Obedencia Debida* was passed.<sup>2</sup> This created a very broad form of the superior orders defence, designed to lead all the ongoing trials to acquittals or abandonment.<sup>3</sup>

The second example, that of the US, is best shown by contrasting two decisions, the *Yamashita*<sup>4</sup> and *Medina*<sup>5</sup> cases. Unlike Argentina, it was caselaw rather than statute that was selective in this instance. It is unclear precisely which level of knowledge the Military Commission required to ground liability in *Yamashita*.<sup>6</sup> The Commission either decided that Yamashita did know of atrocities, or that he should have known.<sup>7</sup> This is probably the standard of liability in custom,<sup>8</sup> even if the Commission's interpretation of the facts, or application of the test is contested.<sup>9</sup> These interpretations need not detain us overlong here, although the Commission's decision does not seem to be reconcilable, on the facts, with the far-better received *Toyoda* case.<sup>10</sup> It is clear that the standard applied in the *Yamashita* case (and, in fact, those in the other post-War cases) was not applied when the US military justice structure was evaluating the conduct of the US army in the Vietnam war. In the case of Ernest Medina, the instructions to the jury by the presiding officer

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<sup>2</sup> Law No. 23521, June 4, 1987, reprinted in (1987) 8 *H.R.L.J.* 477.

<sup>3</sup> Ambos opines that the *ley* "perfected the policy of impunity" K. Ambos, "Impunity in International Criminal Law: A Case Study on Colombia, Peru, Bolivia, Chile and Argentina" (1997) 18 *H.R.L.J.* 1, p.11.

<sup>4</sup> *US v Tomoyuki Yamashita* 4 *L.R.T.W.C.*1 (US Military Commission, Manila); 327 US 1 (US Supreme Court).

<sup>5</sup> *US v Medina* (1971) 43 *C.M.R.*243. The Medina case is the subject of a article written by the chief Prosecutor in that case, W.G. Eckhardt, "Command Criminal Responsibility: A Plea for a Workable Standard" (1982) 97 *Military L.R.* 1. His defence to the charge (made by Telford Taylor "The Course of Military Justice", *N.Y. Times* 2 February 1972, p.37) that the US was propounding different standards for itself to those it applied to others, is that the "should have known" test is "too broad and one that would subject the commander to after-the-fact judgments concerning what he should have known" (*ibid.*, p.18). This, of course is exactly the criticism made of the *Yamashita* case, and goes no way to refuting Taylor's charge.

<sup>6</sup> W. Hays Parks, "Command Responsibility for War Crimes" (1973) 62 *Military L.R.* 1, pp.22-38, especially pp.30-32.

<sup>7</sup> Parks, *ibid.* This was the interpretation of the ICTY in *Prosecutor v Delalic, Mucic, Delic & Landzo*, Judgment, 16 November, 16 November 1998, IT-96-21-T. (*Celebica*), para 384.

<sup>8</sup> *Infra*, p.308.

<sup>9</sup> For opinions casting doubts upon the interpretation of the Military Commission, see M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law* (The Hague: Kluwer, 2<sup>nd</sup> ed., 1998), pp.427-431; A-M Prevost, "Race and War Crimes: the 1945 War Crimes Trial of General Tomoyuki Yamashita" (1992) 14 *H.R.Q.* 303, pp.318-319. See also, in the Supreme Court, Justice Murphy, *supra* n.4, pp.39-40, Parks, *supra* n.7, pp.33-34. The interpretation of the facts appeared to take the test close to the "absolute liability" standard that some suggested it set down in law (for an example of this mistake see Bassiouni, *ibid.*, p.432). Parks notes (*ibid.*, p.62) that the Control Council Law 10 Trials are "of greater value than *Yamashita* in that the respective opinions rendered therein are the product of judicial minds rather than lay jurors, and prepared under less emotive circumstances; the blaze of war had died sufficiently to permit juristic scholarship providing necessary light for future interpretation rather than mere heat". This, from one of the Commission's defenders, must raise the serious possibility that there was bias in the tribunal, and of the wisdom of trying enemy nationals "in the heat of war".

<sup>10</sup> *US v Somen Toyoda*, Transcript. On Toyoda, see Parks, *supra* n.7, pp.69-73; Prevost, *ibid.*, pp.330-335; R. J. Pritchard, The International Military Tribunal for the Far East and the Allied National War Crimes Trials in East Asia" in M.C. Bassiouni (ed.), *International Criminal Law Vol.III: Enforcement* (New York: Transnational, 2<sup>nd</sup>



required actual knowledge of violations of the laws of war.<sup>11</sup> Not only was this contrary to existing jurisprudence, but also the US Army Manual, which embodies the customary rule of “known or should have known”.<sup>12</sup> It would appear that the Colonel giving the instructions was impressed by the argument of the defence in the *Medina* case, that “I don’t think that what is done to a Jap in the heat of vengeance after World War II can be done to an American on an imputed theory of responsibility”.<sup>13</sup>

As can be seen, the narrow or broad drawing of defences or principles of liability can be as important, if not more so, than the definition of the offence, therefore, we might expect to find similar considerations applying to the general contours of liability criminal as to the definitions of individual defences. They do.

## DEFENCES

Focus will first turn to defences. Defences here are those which apply at the merits stage of any proceedings. They do not include immunities from jurisdiction, which are not defences in this sense, hence are dealt with earlier in the thesis, in the sections on jurisdiction.<sup>14</sup>

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ed., 1999) 109, p.143 “The Trial of Admiral Toyoda Soemu is an excellent example of an American War Crimes Trial that impresses me greatly because of its qualities of justice”.

<sup>11</sup> Instructions to Court Members, *United States v Medina* Appellate Exhibit XCIII, p.18. See L.C. Green, “Command Responsibility in International Law” (1995) 5 *Transnational L. & Contemporary Problems* 319, pp.353-354. From the quotation given in Green, it could also be that the formulation required a causation element, which is also not required, see *infra*. pp.311-312.

<sup>12</sup> US Department of the Army. Law of Land Warfare, Field Manual, 27-10, 1956, para 501.

<sup>13</sup> Cited in Prevost, *supra* n.9, p.329. The racist phrasing used in the defence counsel’s statement gives credence to Prevost’s claim, *ibid*, that much of the Yamashita decision was partly based on racial prejudice, even though some of her assertions about the standard of liability in *Yamashita* are overstated.

<sup>14</sup> *Supra* pp.103-114. Dinstein deals with the two together, Y. Dinstein, “Defences” in G.K. McDonald & O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law* (The Hague: Kluwer, 2000) 369, pp.384-388, terming them “defences based on official position”. They are not defences at all, they do not go to the merits of a case, but to the question of jurisdiction. Eser makes a similar distinction to this author, A. Eser, “Defences in War Crimes Trials” in Y. Dinstein & M. Tabor, *War Crimes in International Law* (The Hague: Kluwer, 1996) 251, p.253 They are also waiveable by States, irrespective of the views of the accused, which is inconsistent with the nature of a defence.

## SUPERIOR ORDERS

The issue of superior orders has traditionally been a difficult one,<sup>15</sup> although to read the Nuremberg IMT Charter on the matter, those thinking it to be simple may be forgiven. This is because the Nuremberg IMT Charter simply provides: “[t]he fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment of the Tribunal determines that justice so requires.”<sup>16</sup>

The 1919 Commission effectively ducked the issue of superior orders, leaving it to any subsequent court to decide.<sup>17</sup> In truth, the case law from the pre-WWII era tended to support the “manifest illegality” test (i.e. that although superior orders may constitute a defence, this is only the case where the order is not to commit an act which is manifestly illegal).<sup>18</sup> This was the position adopted by most States and doctrinal commentaries in the period,<sup>19</sup> and it is difficult to fault the conclusion of Dinstein, that “here and there it is, admittedly, possible to find... traces of a trend to exclude the doctrine of *respondere superior*,

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<sup>15</sup> On those generally see A. Cassese, *Violence and Law in the Modern Age* (Cambridge: Polity Press, 1984) ChVII; Y. Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (Leyden: Sitjhoff, 1965); L.C. Green, *Superior Orders in National and International Law* (Leyden: Sitjhoff, 1976); Bassiouni & Manikas, *supra* n.1, pp.374-409; M. Lippman, “Conundrums of Armed Conflict: Criminal Defences to Violations of the Humanitarian Law of War” (1996) 15 *Dickinson J.I.L.* 1, pp.4-58; V. Morris & M.P. Scharf, *The International Criminal Tribunal for Rwanda* (New York: Transnational, 1998) pp.262-268, J.W. Grayson, “Superior Orders and the International Criminal Court” (1995) 64 *Nordic J.I.L.* 243; P. Gaeta, “The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law” (1999) 10 *E.J.I.L.* 172. An interesting socio-legal approach is contained in M.J. Osiel, *Obedying Orders: Atrocities, Military Discipline and the Law of War* (New Brunswick: Transaction, 1999). Eser, *ibid.* p.252 suggests a reason why there has not been enough work on developing approaches to defences (superior orders is an exception), there may be “psychological reservations” about thinking about excluding liability for crimes as serious as war crimes. That is no excuse for not looking into such questions, as Eser correctly notes.

<sup>16</sup> Nuremberg IMT Charter, Article 8.

<sup>17</sup> Report of the Commission on the Responsibility of the Authors of the War and Enforcement, reprinted in Morris & Scharf, (Vol. 2), *supra* n.15, p.438.

<sup>18</sup> See *R v Smith* (1900) 17 SCR 561; *Commonwealth ex rel Wadsworth v Shortall* (1903) 55 Atl. 952; *Riggs v State* (1866) 43 Tenn. 85. The classic cases adopting this view are the *Dover Castle Case* (1922) 16 *A.J.I.L.* 704 and the *Llandovery Castle Case* (1922) 16 *A.J.I.L.* 709.

<sup>19</sup> See the survey by Lippman, *supra* n.15, pp.4-16. There is at least one case where the defence was refused, the infamous *Fryatt* case (see Dinstein *supra* n.15, pp.160-162). The case was heavily criticised. On the other side of the debate, the first edition of Oppenheim claimed there was not liability at all if an order had been given, irrespective of its illegality, manifest or otherwise. L. Oppenheim, *International Law Vol. II* (London: Longmans, 1906) pp.264-265. This was very famously changed, by Lauterpacht in 1944 (H. Lauterpacht (ed.), *Oppenheim's International Law Vol. II* (London: Longmans, 6<sup>th</sup> ed., 1944) pp.452-453.



but these traces are somewhat blurred and indistinct, and the trend is too uncertain to serve as a beacon in this issue.”<sup>20</sup>

Both the US and UK altered their military manuals during WWII, as they initially provided for the Oppenheim-type position of the absolute protection of orders.<sup>21</sup> They were altered, in the British case to a version of the manifest illegality principle,<sup>22</sup> whilst the US manual seemed to accept superior orders as a possible defence or mitigation.<sup>23</sup> Against this background, it seems quite clear that the Nuremberg provision (which was repeated in Article 6 of the Tokyo IMT Charter) went beyond existing international law in refusing reliance on superior orders in any situation.<sup>24</sup> There is one other possibility, which could bring it within the fold of the manifest illegality test. This is to view Article 7 as being limited to the situation, amounting to a pre-determination that the orders involved were manifestly unlawful.<sup>25</sup> The problem with this approach is not only that it would have amounted to an entirely unwarranted intrusion into the fact finding powers of the Nuremberg IMT (although this does not mean the Allies did not intend that) but also that it may not reflect the discussion surrounding the matter in the London Conference.<sup>26</sup>

Like the prosecution when they argued before it,<sup>27</sup> the Nuremberg IMT itself showed some uncertainty relating to this aspect of the Charter. It gave the conclusionary declaration that “the provisions of this article are in conformity with the law of all nations... the true test, which is found in varying degrees in the criminal law of most

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<sup>20</sup> Dinstein, *ibid.*, p.103. These traces include The Treaty of Washington in Relation to the Use of Submarines and Noxious Gases in Warfare, (1922) 16 *A.J.I.L.* Supp. 57, never in force. See Dinstein, *ibid.*, pp.97-100. Eser, *supra* n.14, p.255 believes that there was no custom prior to the start of World War II, which, given the practice cited, seems over cautious. The debates surrounded what the rule was, not if one existed.

<sup>21</sup> Oppenheim, *supra* n.19. See Dinstein *ibid.*, pp.46-48; Lippman, *supra* n.15, p.21.

<sup>22</sup> Amendment 34 to the *Manual of Military Law* (London: HMSO, 7<sup>th</sup> ed 1944).

<sup>23</sup> Basic Field Manual, Rules of Land Warfare, Change No 1. 15 November 1944. See also Bassiouni & Manikas, *supra* n.1 p.375, “the military regulations of almost all States prior to the IMT Charter essentially had provided for an absolute or qualified defence of superior orders”.

<sup>24</sup> See Dinstein, *supra* n.15, p.117, *ibid.*, p.118 he describes it as “high handed and sweeping”.

<sup>25</sup> See H. McCoubrey, *International Humanitarian Law* (Aldershot: Ashgate, 2<sup>nd</sup> ed., 1998) p. 302.

<sup>26</sup> Dinstein, for example claims that it grants too much subtlety to the drafters’ intent, *supra* n.15, p.129, Garraway, on the other hand, makes much of a statement by Nikitchenko who asked if with such major criminals it was an issue of principle. C. Garraway, “Superior Orders and the International Criminal Court:

nations, is not the existence of the order, but whether in fact moral choice was in fact possible.”<sup>28</sup> The assertion that it is in conformity with the law of all nations is patently false. More obscurely, it seems to add the requirement that there was no “moral choice” to the test relating to superior orders.<sup>29</sup> Dinstein gives the best explanation for this. He claims that in reality the Tribunal was accepting that superior orders were not, in and of themselves, a defence under the Nuremberg IMT Charter, but expressing their view that the existence of superior orders was relevant to other such defences as coercion (duress).<sup>30</sup> A further complication is that the Nuremberg IMT, when discussing the case of Jodl, came rather close to accepting that the test for superior orders as a defence was manifest illegality.<sup>31</sup>

Still, both Control Council Law 10 and the “Nuremberg Principles” asserted the view that superior orders were not a defence (Principle IV).<sup>32</sup> This is possibly the “Nuremberg Principle” around which most controversy has centred. A major reason for this has been the relatively low uptake for this position in national laws.<sup>33</sup> This need not be fatal to the claim that the Nuremberg provision represents the law, but the position is weakened by the presence of contrary practice. This contrary practice began in the Nuremberg “subsequent proceedings”, in which US tribunals, in the *Einsatzgruppen*<sup>34</sup> and *High Command*<sup>35</sup> Cases seemed to express the manifest illegality test, as did certain other judgments in the direct post-War period.<sup>36</sup> Expressions of that test have continued in

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Justice Delivered or Justice Denied?” (1999) 336 *I.R.R.C.* 785, p.787. There is no evidence that his view was accepted, and it was not by the Nuremberg IMT.

<sup>27</sup> See Gaeta, *supra* n.15, p.180.

<sup>28</sup> Nuremberg IMT “Judgment and Sentences” (1947) 41 *A.J.I.L.* 171, p.221.

<sup>29</sup> See e.g. M. Greenspan, *The Modern Law of Land Warfare* (Berkeley: University of California Press, 1959) p.493.

<sup>30</sup> Dinstein, *supra* n.15 p.152. This is supportable by the Judgment in relation to Jodl, Nuremberg IMT Judgment, *supra* n.28, p.316, see Lippman, *supra* n.15, p.19.

<sup>31</sup> IMT Judgment, *ibid.*

<sup>32</sup> GA Resolution 177, UN Doc. A/1316.

<sup>33</sup> Gaeta cites (*supra* n.15, p.179), Argentina, Austria, Iran, Romania and the UK. Also to some extent, France, Norway and the Netherlands (*ibid.* pp.179-180). Also the Israeli Law (on Nazi Crimes) rejects the defence Nazis and Nazi Collaborators (Punishment) Law 1950, 57 Sefer Hachukim, 9 August 1950, 281.

<sup>34</sup> *US v Ohlendorf* 4 T.W.C. 411 pp.470-471.

<sup>35</sup> *US v von Leeb* 12 T.W.C. 1 pp.88-89.

<sup>36</sup> For example, *US v Masuda* (*The Jaluit Atoll Case*) 1 L.R.T.W.C. 71, see Lippman, *supra* n.15, p.35. For more of such cases see generally, Green, *supra* n pp.283-348; Lippman, *ibid.*, pp.21-34; Gaeta, *supra* n.15, p.177.



various cases up to the present day,<sup>37</sup> although the defence was generally rejected, on the facts at least.<sup>38</sup> In the sphere of international legislation, suggestions were made to include provisions relating to superior orders. All were rejected as they did not gather enough support.<sup>39</sup> The ILC has wavered on the total exclusion of the defence,<sup>40</sup> and academic opinion has been split. The schism is between those asserting the manifest illegality test,<sup>41</sup> and those adopting the position that superior orders are never a defence *per se*, but may be a relevant factor for other defences, such as duress.<sup>42</sup> In practice, the difference may not be particularly important as the orders in cases coming to trial will probably be considered manifestly illegal.<sup>43</sup> That does not mean it will never be so, particularly in matters such as targeting, where the application of the rule to the facts may be difficult. By the early 1990s, the simple fact was that either position could be asserted and receive a fair level of support.

When the ICTY was created the only State's comment addressing the issue which did not reject the manifest illegality test was that of the US.<sup>44</sup> The ICTY Statute, in Article 7(4) adopts the Nuremberg-type position, that superior orders are not a defence (although it is now accepted that they may be relevant for other defences).<sup>45</sup> The US was unhappy about this, and both in the Security Council,<sup>46</sup> and in its draft Rules of

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<sup>37</sup> See the US Cases of *US v Kindler* (1953) 14 CMR 742, *US v Calley* (1973) 48 CMR., (1973) 22 U.S.C.M.A. 534, *Priebke* Rome Military Court of Appeal 7 March 1998. Lippman, goes as far as to say the cases show "coherence and consensus" on manifest illegality, *ibid.* p.52.

<sup>38</sup> See Gaeta, *ibid.*, pp.183-184 It is wrong, however to consider this to be evidence of the rejection of the manifest illegality test, there is a conceptual difference between rejecting the application of a test, and applying the test, but finding that the facts do not fall within it.

<sup>39</sup> In the Genocide Convention, a provision excluding superior orders was defeated (A/C.6/215/Rev.1) The vote was 28-15-6 See Lippman, *supra* n.15, pp.51-53; Bassiouni & Manikas, *supra* n.1, p.401. In both the Geneva Convention negotiations and those leading up to the 1977 Additional Protocols, no agreement could be reached, but ICRC proposals including a conditional liability (manifest illegality) approach were rejected. See Gaeta *ibid.*, pp.187-188.

<sup>40</sup> See the history of the ILC's approaches in O Triffterer, "Article 33" in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999) 573, pp.574-576. They latched on to the "moral choice" aspect, thus, if Dinstein's approach is followed, not accepting the defence.

<sup>41</sup> The primary proponent of this view is L.C Green, *supra* n.15. See also McCoubrey, *supra* n.25, pp.298-303; S. Ratner & J. Abrams, *Accountability for Human Rights Atrocities in International Law* (Oxford: OUP, 1997) pp.121-123; Lippman, *supra* n.15, p.52.

<sup>42</sup> This view is almost synonymous with Dinstein's classic *The Defence of 'Obedience to Superior Orders' in International Law*, *supra* n.15; see also A.P.V. Rogers, *Law on the Battlefield* (Manchester: MUP, 1996) p.144-146.

<sup>43</sup> Gaeta, *supra* n.15, pp.183-186.

<sup>44</sup> S/25575, Article 11(a).

<sup>45</sup> On this see V. Morris & M.P. Scharf, *An Insiders' Guide to the International Criminal Tribunal for the Former Yugoslavia* (New York: Transnational, 1995) pp.101-103.

<sup>46</sup> S/PV.3217, p.16.

Procedure,<sup>47</sup> it attempted to bring the ICTY into line with its acceptance of the manifest illegality test. Partially as this ran directly counter to the express provisions of the ICTY Statute, this did not work. The ICTR has an identical provision on superior orders.<sup>48</sup>

It might be thought that the rejection of the manifest illegality approach in two international tribunals would settle the issue for the Rome Conference. It certainly strengthened the case for such an approach to the extent that the onus must have been on the proponents of the manifest illegality test to prove its continued international relevance. But of course, the situations surrounding the creation of (and thus State concerns about being the subject of) these two tribunals were very different to the circumstances and policies surrounding the creation of the ICC.<sup>49</sup> This is not to say that there was no support for the approach in the existing tribunals' statutes. A strong coalition of States (led by Germany) supported that position. Opposition came from another group led by the US, who clung to the manifest illegality test, as the position, *lex lata*.<sup>50</sup> The result was a compromise, and not a comfortable one.<sup>51</sup>

Article 33<sup>52</sup> provides that: "1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) That person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful

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<sup>47</sup> US Suggestions on Rules of Procedure and Evidence, IT/14, 17 November 1993, Rules 25.14(A).

<sup>48</sup> Article 6(4) See Morris & Scharf, *supra* n.45, pp.266-268.

<sup>49</sup> Gaeta, *supra* n.15, p.178 admits that the possible reason surrounding the adoption of the Nuremberg type approach in all international tribunals prior to Rome may well have been the result of them all being set up to try non-nationals of the creating States. The one arguable exception would be the ICTR.

<sup>50</sup> Gaeta, *ibid.* pp.188-189.

<sup>51</sup> Per Saland, the Chair of the Working group that drafted it describes the Article's drafting as "very difficult" P. Saland, "International Criminal Law Principles" in R.S. Lee (ed.), *The International Criminal Court* (The



2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful”

Cassese avers: “Article 33 must be faulted as marking a retrogression with respect to existing customary international law.”<sup>53</sup> This may be the case, in particular after the creation of the two UN tribunals in the 1990s which adopted the opposite position.<sup>54</sup> Even if it is not,<sup>55</sup> it shows that in the case where States are legislating for themselves, rather than for others, they are either supporters of, or prepared to accept, a more lenient corpus of law. In addition, there are certain other issues. Although Article 33’s acceptance of the manifest illegality test is (presumably) meant to be limited to war crimes (by Article 33(2)),<sup>56</sup> the wording is infelicitous. “Orders to commit genocide or crimes against humanity” is an ambiguous phrase. In the case of genocide, the special intent is of the essence of the offence. Here, this intent is presumably that of the orderer. The orders themselves will most likely be to commit certain acts, not to “commit genocide”. Therefore, it is possible that if the orderer can be proven to have genocidal intent, even if this cannot be shown for the subordinate, the order will be taken to be manifestly illegal. This could be the case even if the subordinate is charged with a war crime. Even if the court does not adopt such an approach, Article 33 runs against the grain of the idea of a

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Hague: Kluwer, 1999) 189 p.211. *Ibid.* p.212 he notes “the article is very difficult to read and is bound to be debated”.

<sup>52</sup> On which see, Triffterer *supra* n.40.

<sup>53</sup> A. Cassese, “The Rome Statute of the International Criminal Court: Some Preliminary Reflections” (1999) 10 *E.J.I.L.* 144, pp.157. See also Gaeta, *supra* n.15, p.190 describing it as having departed from customary international law without reason.

<sup>54</sup> Another possible problem (although one which, for the moment must remain speculative) is that if (as may well occur) any existing caseload of the ICTY or ICTR is passed to the ICC upon the abolition of those bodies, the applicable law will be different.

<sup>55</sup> See Garroway, *supra* n.26.

<sup>56</sup> Admittedly 33(2) does not include aggression in this list, but this is probably a reflection of a mistake, aggression was added at the last minute. Anyway, unless and until aggression is defined, war crimes are the presumed beneficiary of 33(1).

coherent set of laws which applies to all international crimes; it creates a defence applicable only to one sort of crime.<sup>57</sup>

## OTHER DEFENCES

With the above provisions we reach the end of the defences which were express in any of the statutes prior to Rome. It certainly gives pause for thought that, particularly in Nuremberg, the only mention of defences was to exclude the application of those most likely to be asserted. It is unfortunate that this was the pattern that was followed until the Rome Conference. Equally, when the ICTY was created at least the Secretary-General recognised that other defences would be relevant. In his report on the ICTY he left decisions on the applicability and definitions of these to the ICTY itself though: “the International Tribunal will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing on principles of law recognised by all nations.”<sup>58</sup> The same authority was granted to the ICTR. Between them, both Tribunals have developed substantial bodies of jurisprudence in relation to these matters.<sup>59</sup> States were not prepared to allow the ICC to act in such a fashion.<sup>60</sup> For the ICC, States insisted on defining the substantive defences themselves.<sup>61</sup> This is not necessarily a bad thing, as it provides for the first time an express statement of the defences which may be presented in a trial of international

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<sup>57</sup> That there are more defences for war crimes than the others also may well be probative of governmental fears that they, whilst highly unlikely to be charged with genocide or crimes against humanity, may well see themselves, or their nationals charged with war crimes. This is implied also by Gaeta, *supra* n.15, p.189.

<sup>58</sup> Report of the Secretary General Pursuant to paragraph 2 of Security Council Resolution 808, UN. Doc. S/25704, para 58. Leaving it to the ICTY has not gone uncriticised, see C. Blakesley, Atrocity and its Prosecution: The *Ad Hoc* Tribunals for the Former Yugoslavia and Rwanda” in T.L.H. McCormack & G.J. Simpson, *The Law of War Crimes: National and International Approaches* (The Hague: Kluwer, 1997) 189, p.204.

<sup>59</sup> The most famous of these must remain the controversial *Erdemovic* decision, which has been the subject of much criticism. See S. Linton, “Reviewing the Case of Drazen Erdemovic: Uncharted Waters at the International Criminal Tribunal for the Former Yugoslavia” (1999) 12 *L.J.I.L.* 251; R. Cryer, “One Appeal, Four Opinions, Two Philosophies and a Remittal” (1998) 2 *J.A.C.L.* 193; P. Rowe, “Duress as a Defence to War Crimes After Erdemovic: A Laboratory for a Permanent Court?” (1998) 1 *Y.B.I.H.L.* 210 D. Turns, “The International Criminal Tribunal for the Former Yugoslavia: The *Erdemovic* Case” (1998) 47 *I.C.L.Q.* 461; O. Swaak-Goldman, “International Decisions: Prosecutor v Erdemovic” (1998) 92 *A.J.I.L.* 282.

<sup>60</sup> President McDonald, has described the tribunal as a “laboratory” for the law here (ICTY Press Release CC/PIO/272/E 9 December 1997) cited in Rowe *ibid*. Not only were many States happy to use the results of these experiments, but were unwilling to give such powers to the ICC, which could use their nationals as Guinea pigs.

<sup>61</sup> Saland, *supra* n.51, p.206 notes that this was not an easy thing to do. On Article 31 generally, see Saland, *ibid* pp.206-210; A. Eser, “Article 31” in Triffterer (ed.), *supra* n.40, 537.



crimes,<sup>62</sup> providing at least a form of Franckian legitimacy. Most of the defences are probably supportable by existing law. These are mental illness,<sup>63</sup> duress,<sup>64</sup> necessity,<sup>65</sup> intoxication,<sup>66</sup> and mistakes of fact (if, and only if, such mistakes of fact operate to negate *mens rea*).<sup>67</sup> Two defences included are the subject of controversy. Self-defence, although in itself not generally considered unacceptable (albeit most are at a loss to explain in what circumstances it could be raised)<sup>68</sup> is defined in Article 31(1)(c) in a way that gives cause for concern. That a person who “acts reasonably to defend himself or herself or another person” should not be liable is not contested.<sup>69</sup> Article 31(1)(c) goes beyond this, providing, for war crimes,<sup>70</sup> that a person acting reasonably to defend “property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force” has a defence. The last part of 31(1)(c) has never been seen before in humanitarian law, and “this extension is manifestly outside the *lex lata* and may generate quite a few misgivings”.<sup>71</sup> The other is the defence of mistake of law, contained in Article 33(2). Antonio Cassese is highly critical of this provision, on the grounds that this has never been a defence in national law, and has only the most tenuous claim to a place in

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<sup>62</sup> See Cassese, *supra* n.53, p.153.

<sup>63</sup> Rome Statute, Article 31(1)(a) see Eser, *supra* n.61, pp.545-546, who notes that this was not a controversial matter.

<sup>64</sup> *Ibid.* Article 31(1)(d)(i). This is a notable change from the *Erdemovic* Case’s rejection of the defence. As mentioned above though, this case has been the subject of much negative comment and probably did not represent the law on the matter. In addition *Erdemovic* only rejected the defence for killings, not all offences. In addition see Eser, *supra* n.14, pp.263-265. Dinstein (Y. Dinstein, “International Criminal Law” (1985) 20 *Israel L.R.* 206, pp.232-235) thinks that duress cannot be a defence to killing, or genocide.

<sup>65</sup> *Ibid.* Article 31(1)(d)(ii). See Eser, *ibid.*, pp.261-263; Eser, *supra* n.61, p.550 criticises Article for mixing duress and necessity in one provision. In the *Aleksowski* Appeal, *Prosecutor v Aleksowski*, Judgment, 24 March 2000, IT-95-14/1-A, the Appeals Chamber decided they did not need to express an opinion of if necessity is a defence in international law. If it was not, then the Rome Statute would have created a defence previously unavailable.

<sup>66</sup> Article 31(1)(b). Some were a little unsure on this, but it is probably the case that it represents a general principle of criminal law, at least for involuntary intoxication, see Saland, *supra* n.51, p.207. The bigger problem was that some States wanted the inclusion of voluntary intoxication, the end result “which had the benefit of not satisfying anyone” (Saland, *ibid.*), excludes it in most circumstances. See also Eser *supra* n.61, 546-548.

<sup>67</sup> Article 32(1). O Triffterer “Article 32” in Triffterer (ed.), *supra* n.40, 555, pp.555-568. As he notes, (*ibid.*, p.567) it merely states the obvious where there is no *mens rea* there is no offence. For previous acceptance of this see Eser, *supra* n.14, pp.267-268; Dinstein, *supra* n.64, pp.235-236.

<sup>68</sup> See Eser, *ibid.*, p.263.

<sup>69</sup> The wording is from Article 31(1)(c). It is admittedly difficult to imagine where acting “reasonably” could amount to an offence in the jurisdiction of the court though.

<sup>70</sup> Again we see a specialised regime being created for these offences.

<sup>71</sup> Cassese, *supra* n.53, pp.154-155. He also notes (p.155) that the phrasing is vague. Saland, *supra* n.51, p.208 informs us that this was the most difficult provision in the working group, and it runs against the principle they tried to work to that the general principles were applicable to all the crimes. Eser, *supra* n.61, pp.548-550,

international law.<sup>72</sup> As the Rome Statute sets the relevant law out itself, this provision “amounts to a serious loophole... and may eventually be misused for the purpose of perpetrating crimes clearly prohibited by international law”.<sup>73</sup> He may be being too harsh on Article 33(2). As Triffterer points out, there are very few possible situations in which this could apply.<sup>74</sup> The article does not apply to situations where the person merely does not know the crime is under the jurisdiction of the court,<sup>75</sup> nonetheless, it does raise serious issues of principle. With crimes of such a serious nature, ignorance of the law is a dubious defence.<sup>76</sup>

These are all the exclusions of liability expressly provided for in the Statute. However, the Court, in an extraordinary provision, is entitled, by Article 31(2), to refuse to apply a particular ground from Article 31, in the case before it.<sup>77</sup> Saland reports that the article was necessary for negotiating purposes, primarily, as delegations were unhappy with various formulations of the defences, so this discretion was necessary to get agreement.<sup>78</sup> As some of the definitions are more widely drawn than customary law, this may work to limit the problems, but it may raise important questions of *nullum crimen sine lege*.<sup>79</sup> On the other hand, the ICC will be constrained by Article 21, which will require it to work within the bounds of international law.<sup>80</sup> It is indicative of serious problems that States felt they had to add a provision allowing the Court to disapply part of the Statute if needs be, as the definitions were flawed.

That does not dispose of all possible defences, such as reprisals, and, for certain war crimes, military necessity.<sup>81</sup> The impossibility of getting agreement on these led to the inclusion of Article 31(3), which allows the Court, with Article 31(2), “to consider a

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especially p.549 is the most sanguine, tying it back to notions of military necessity, but also notes the difficulty in limiting it.

<sup>72</sup> *Ibid.* p.155-156. For interpretation of the provision, see Triffterer *supra* n.67, pp.568-569.

<sup>73</sup> *Ibid.* p.156. It also could amount to a disincentive to dissemination (*ibid.*).

<sup>74</sup> *Supra* n.67, p.569.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Supra* n.72.

<sup>77</sup> Article 32(2), see Saland, *supra* n.51, p.208-9.

<sup>78</sup> *Ibid.*

<sup>79</sup> Saland, *ibid.*

<sup>80</sup> Triffterer, *supra* n.67, p.553.



ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from the applicable law as set forth in article 21". It is ironic that the only discretion granted to the ICC may be to create new grounds of excluding liability.

## PRINCIPLES OF LIABILITY

Principles of liability are the counterpart of defences, as they too relate to the parameters of liability. They are traditionally an area of responsibility that has been little discussed by States and have played a limited role in the statutes of international criminal courts. This has caused many problems and was a gaping hole in international criminal law. As Cassese has said, aptly: "it is well known that the current rules of international law on individual criminal responsibility make up a body of law that is still fairly rudimentary and unsophisticated".<sup>82</sup> This is not to say that there is no law on the subject at all, particularly as certain principles may be derived from general principles of law, it was just that little effort had traditionally been expended discovering such principles.

The Nuremberg IMT Charter included provisions on the principles of liability. The Charter provided that "leaders, organizers, instigators and accomplices participating in the formulation or execution of a Common Plan or Conspiracy... are responsible for all acts performed by any persons in execution of such plan." This was complimented by Article 6(a) which stated that liability existed for "participation in a common plan or conspiracy for the accomplishment of the above [crimes against peace]." This latter phrase is absent from both Article 6(b) and 6(c). As a result, it is difficult to see whether the final clause in Article 6 was intended to create a separate, free standing charge of conspiracy, or if it was

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<sup>81</sup> Which also possibly arises under Article 8(2)(b).

<sup>82</sup> *Supra* n.53, p.148.

merely an aspect of the crime against peace charge in Article 6(a).<sup>83</sup> The reason for this vagueness is simple, the Charter was a compromise on this issue.

The concept of conspiracy is a creature of the common law, unknown to the civil law systems at the time.<sup>84</sup> This fact is fatal to any claim of conspiracy being a part of international law by virtue of it being a general principle of law. In addition, there were no precedents for this in international law, so any claim for customary status must also fail. The reason for its inclusion at all was US insistence, their entire plan for dealing with Germany was based on the assumption that there was a wide-ranging conspiracy, and its plans for dealing with the large number of putative defendants began with the idea of this conspiracy.<sup>85</sup>

In the Nuremberg IMT Judgment on the conspiracy count, despite the US prosecutors insistence that conspiracy covered all of the crimes in Article 6, it was determined that the conspiracy crime only related to the charges under 6(a).<sup>86</sup> Even this was controversial, both of the French judges and one of the US judges wanted to reject the charge in its entirety.<sup>87</sup> Even the charge that remained was limited. For proof of conspiracy, the Nuremberg IMT required “the conspiracy must have been clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action... a concrete plan to wage war [must have] existed and [the IMT be able to] determine the participants in that concrete plan.”<sup>88</sup> The Nuremberg IMT also were quite

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<sup>83</sup> See Murphy, “Norms of Criminal Procedure at the International Military Tribunal” in G. Ginsburgs & V.N. Kudriavtsev, *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff, 1990) pp.68-69.

<sup>84</sup> H. Ehard, “The Nuremberg Trial Against the Major German War Criminals and International Law” (1949) 43 *A.J.I.L.* 223, p.227; Murphy, *ibid.*, p.64; T. Taylor, *The Anatomy of the Nuremberg Trials* (New York: Little, Brown & Co., 1992) p.36; S. Pomorski, “Conspiracy and Criminal Organisations” in Ginsburgs & Kudriavtsev, *ibid.*, p.219. The French and Soviet delegates to the London Conference were said to be shocked by the idea of conspiracy when it was explained to them, Pomorski, *ibid.* R.K. Woetzel, *The Nuremberg Trial in International Law* (London: Stevens, 1962) p.215 sums up the position well, “there is very little, if any, basis for assuming that the concept of conspiracy was part of international law prior to the Nuremberg Trial.” See also R. Minear, *Victors’ Justice: The Tokyo War Crimes Trial* (Princeton: Princeton U.P., 1971) pp.36-42.

<sup>85</sup> This was the basis of the original “Bernays” plan, which shaped US ideas on the trial of the Germans. See Taylor, *ibid.*, pp.35-36; H. Levie, *Terrorism in War: The Law of War Crimes* (New York: Oceana, 1992) pp.405-411.

<sup>86</sup> IMT Judgment, *supra* n.28, pp.223-224.

<sup>87</sup> B.F. Smith, *Reaching Judgment at Nuremberg* (London: Andre Deutsch, 1977) p.129, Taylor, *supra* n.84, p.550.

<sup>88</sup> IMT Judgment, *supra* n.28, p.222.



strict on the requirement of actual knowledge of the plan.<sup>89</sup> Despite this, the Tribunal did not define the acts that amounted to participation, and was not consistent in the individual judgments.<sup>90</sup> Conviction on this count seemed irrelevant in the sentencing.<sup>91</sup> Perhaps that is indicative of the Nuremberg IMT's distinct antipathy to this charge. Article 5 of the Tokyo IMT had a provision for our purposes identical to that in Nuremberg, but its handling of the charge was far less subtle, and the majority did little to demonstrate any discomfort with this novel charge.<sup>92</sup> Although two of the judges in Tokyo expressly rejected the crime of conspiracy, saying it had no basis in international law,<sup>93</sup> the majority proceeded to take an exceptionally wide approach, going far beyond the Nuremberg limits, and disregarding "even the bounds set by Anglo-American jurisprudence".<sup>94</sup>

After the Nuremberg IMT's judgment, the ILC adopted "Nuremberg Principles" which recognised that "[a]ny person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefor... [and liability may arise for]... Complicity in the commission of a crime."<sup>95</sup> The problem with the cumulative effects of these was that although the Nuremberg principles recognised complicity, it was far from settled exactly what crimes "complicity" entailed. A close reading of the Nuremberg judgment only helps a little. The most succinct expression of what can be derived from the Nuremberg IMT judgment, although it is not totally accurate, is given by Lippman, who asserts that it required that "the evidence 'sufficiently' connected the defendant to the planning, ordering, inciting, or commission of war

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<sup>89</sup> See Pomorski, *supra* n.84, p.234.

<sup>90</sup> See I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon, 1963) pp.196-199.

<sup>91</sup> Pomorski, *supra* n.84, p.235.

<sup>92</sup> The majority agreed with the Nuremberg IMT, see R.J. Pritchard & S.M. Zaide, *The Tokyo War Crimes Trial Vol 20: Judgment* (New York: Garland 1981) p.48,439. Judge Bernard and Judge Jaranilla both expressly upheld the charge for all Crimes in Article 5, (*ibid.* Vol 21 *Separate Opinions* (of Bernard & Jaranilla) pp.4-7, 1-7 respectively).

<sup>93</sup> Judge Webb, and Judge Pal (*ibid.* pp.475, 491).

<sup>94</sup> Brownlie, *supra* n.90, p.203; J. Piccigallo, *The Japanese on Trial* (Austin: University of Texas Press, 1979) p.212 sums up their approach admirably, showing "a misplaced determination to force, after the fact, unrelated and fortuitous events into a preconceived thesis."

<sup>95</sup> GA Resolution 177 *supra* n.32.

crimes... mere knowledge of crimes, communication of orders, or a failure to prevent commission of such acts was not sufficient.”<sup>96</sup>

When the ICTY was created, more attention was paid to the matter. Almost all of the State comments dealt with principles of liability.<sup>97</sup> The relevant Article in the ICTY Statute (to which Article 6(1) of the Rwanda Statute is identical in all material respects) is Article 7(1). This provides that “[a] person who plans, instigates, orders, commits or otherwise aids and abets in the planning, preparation or execution of a crime incurs individual criminal responsibility.” This list is probably no more than customary. Not only did the State comments basically agree on this matter,<sup>98</sup> but also the customary nature of Article 7(1) has been confirmed by the Trial Chambers on several occasions (with adequate support),<sup>99</sup> and was accepted by the Appeals Chamber.<sup>100</sup> In addition, no defendant has challenged the acceptability of this provision, debate has merely raged over interpretation. With respect to genocide, Article 4 gives the ICTY jurisdiction over the inchoate crimes given in Article III of the Genocide Convention. This is customary, as a part of that convention.<sup>101</sup>

As the Rome Statute, for the first time, sets out in detail the principles of criminal liability in international criminal law, it “undoubtedly constitutes a major advance in international criminal law”.<sup>102</sup> In particular it has made the Statute watertight from the point of specificity, and not subject to the criticisms levelled at the *ad hoc* Tribunals’ statutes. There was never any dispute that such specificity should be in the Rome

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<sup>96</sup> M. Lippman, “Nuremberg Forty-Five Years Afterwards” (1991) 7 *Connecticut J.I.L.* 1, p.33. Some questions may arise about his assertion on the passing on of orders, and prevention of crimes, see *infra*, p.306.

<sup>97</sup> See the summary of proposals in Morris & Scharf, *supra* n.45, pp.364-366.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Prosecutor v Tadic*, Opinion and Judgment, 7 May 1997, IT-94-1-T, paras 663-669; citing, *inter alia*, *Wagner*, 3 L.R.T.W.C. 24, 40-42, 94-95; *Weiss*, 11 L.R.T.W.C. 5 and three national laws on war crimes.); *Prosecutor v Furundzija*, Judgment, 10 December 1998, IT-95-17/1-T, paras 193-216, (using various post-WWII trials to derive definitions of aiding and abetting); *Celebici supra* n.7, paras 319-321; citing *Tadic* and Article 2 of the ILC Draft code (1996), and (for the crime of ordering offences), the Geneva Conventions. On the crime of ordering international crimes, this crime was recognised far before that time, its genesis is traceable at least back as far as the Hague regulations, see L.C. Green, “Command Responsibility in International Law” *supra* n.11. On all the others, they are also present in similar form in the 1991 Draft Code (Article 3) (importantly predating the ICTY, unlike the 1996 Draft), and the 1954 Code. (Article 2(13))

<sup>100</sup> *Prosecutor v Tadic*, Judgment, 15 July 1999, IT-94-1-A, paras 186-189.

<sup>101</sup> Morris & Scharf, *supra* n.45, p.96.



Statute,<sup>103</sup> but full praise must be reserved until an examination its provisions can be undertaken.

Article 25(3) sets out the principles. It reads:

“A person shall be criminally responsible and liable for a crime within the jurisdiction of the Court if that person,

(a) Commits such a crime... ;

(b) Orders, Solicits, or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

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<sup>102</sup> Cassese, *supra* n.53, p.153.

<sup>103</sup> See C.K. Hall “The First and Second Sessions of the Preparatory Committee for the International Criminal Court” (1997) 91 *A.J.I.L.* 177, p.181, C.K. Hall, “The Third and Fourth Sessions of the Preparatory Committee for the International Criminal Court” (1998) 92 *A.J.I.L.* 124, pp.129-130.

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose".

A few points may be noted.<sup>104</sup> Article 25(3)(b) raises slight concerns. For liability to accrue under the Rome Statute for ordering a crime, that crime must be at least attempted. This requirement is not present, for example, in either the ICTY Statute or the Geneva Conventions. This addition is unnecessary, and adds a burden to the Prosecution, who will not only have to prove the existence of the order, but now that the crime itself occurred or was attempted and quite possibly that the crime was referable to the order. Article 25(3)(d) is probably the most controversial of these provisions. It is basically a form of liability for conspiracy. Although such an offence is probably (as a result of the Nuremberg and Tokyo IMTs' judgments) part of customary international law, its inclusion was still controversial, as it remains primarily an offence particular to common law systems.<sup>105</sup> Perhaps to sweeten the pill for those countries not having municipal crimes of conspiracy, the wording for the definition of the crime is taken directly from the International Convention on Terrorist Bombings.<sup>106</sup> It may, however, have defined this form of liability more narrowly than customary law. It requires the accomplice to either know that the offence is the point of the common purpose (Article 25(3)(d)(i)), or know that the offence will be committed. This latter part is more limited than the

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<sup>104</sup> On this see K. Ambos, "Article 25" in Triffterer (ed.), *supra* n.40, 475; Saland, *supra* n.51, pp.198-200. Generally see F. Malekian, "Individual Criminal Responsibility" in M.C. Bassiouni (ed.), *International Criminal Law Vol.I: Crimes* (New York: Transnational, 2<sup>nd</sup> ed. 1999) 153, K. Ambos, "Individual Criminal Responsibility in International Criminal Law" in McDonald & Swaak-Goldman (eds.), *supra* n.14, 1.

<sup>105</sup> Ambos (in Triffterer), *ibid.*, p.483.

<sup>106</sup> GA Res, 52/164. UN Doc. A/RES/52/164 See M. Arsanjani, "The Rome Statute of the International Criminal Court" (1999) 63 *A.J.I.L.* 22 p.36.



customary test enunciated in the *Tadic* appeal,<sup>107</sup> which only requires “foresight that those crimes outside the criminal common purpose were likely to be committed”.<sup>108</sup>

In one situation, the Rome Statute may cast the net of liability wider than customary law, for aiding and abetting. Article 25(3)(c) gives liability when a person, “for the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission.” Customary international law probably requires the assistance to be “substantial”.<sup>109</sup> However, the Article also introduces a purposive, motive requirement that is not required by custom (under which knowledge suffices).<sup>110</sup> Thus the crime is not defined in accordance with customary law, but it is difficult to say whether or not it will, in practice, be broader or more narrow.

In relation to *mens rea*, Article 30 of the Rome Statute requires that (unless otherwise declared in the Statute (one example of which may be genocide)) for a conviction to be recorded, the defendant must have acted with knowledge and intention.<sup>111</sup> For the majority of crimes, this is correct.<sup>112</sup> For certain crimes, such as initiating attacks with the possibility of excessive incidental damage, recklessness has traditionally been seen as enough, so the Rome Statute is narrower than existing custom.<sup>113</sup>

## COMMAND RESPONSIBILITY

There is one special principle of liability which merits separate treatment. That is command responsibility. Command responsibility is the liability of a superior for crimes

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<sup>107</sup> Ambos also makes this point, referring to earlier jurisprudence, *supra* n.104, p.486, but distinguishes them on the grounds that they are dealing with responsibility under the analogue to Article 25(3)(c).

<sup>108</sup> *Prosecutor v Tadic*, *supra* n.100, para 229.

<sup>109</sup> See Ambos, *supra* n.104, 481-483. This has been confirmed by the *Tadic* Appeal, *ibid*.

<sup>110</sup> Ambos, *ibid.*, p.483, this, again has been confirmed by *Tadic*, *ibid*.

<sup>111</sup> See Saland, *supra* n.51, pp.206-207; D.K. Pigaroff, “Article 30” in Triffterer (ed.) *supra* n.40, 527.

<sup>112</sup> Knowledge is defined as “aware that it will occur in the ordinary course of events” which overcomes the possible problem that a requirement of subjective absolute certainty of consequences could imply.

<sup>113</sup> See Cassese, *supra* n.53, p.154. Again here we may have seen a dilution of prohibitions with particular relevance to aerial warfare, thus for those countries with strong air forces. In addition, see *supra* pp.264-265. where it is noted that the knowledge requirement for this crimes is also higher than is applicable.

committed by forces not ordered by that superior, but tolerated by him.<sup>114</sup> In the *Celebici* case, the ICTY elaborated the threefold requirements of the concept, as being first a superior/subordinate relationship; secondly, the “mental element” (that it defined as “knew or had reason to know”)<sup>115</sup> and thirdly a failure to take reasonable measures to prevent or punish violations of international criminal law.<sup>116</sup> This triumvirate has been adopted by the UN tribunals since and is a helpful list of the requirements.<sup>117</sup> The definitions of these requirements have been the subject of debate, but discussion will be limited here only to those elements necessary for an understanding of State approaches to principles of liability.

The principle of command responsibility was not directly mentioned in the Nuremberg or Tokyo IMTs’ Charters, although the principle was certainly relied on, if not widely at Nuremberg, then certainly at Tokyo. The Nuremberg judgment mainly dealt with ordering of offences, although at times, for example in the judgment on Frick, the IMT seemed to hold defendants responsible for not bringing to an end offences they were aware of.<sup>118</sup> Mostly, though, it is as Green says, “the Nuremberg Tribunal’s findings were only concerned with command responsibility in the most indirect fashion”.<sup>119</sup> The Tokyo IMT’s judgment on war crimes, on the other hand, dealt almost entirely with negative criminality and command responsibility. Its discussion is particularly interesting for the reason that it dealt not only with military superiors (to which it was generally

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<sup>114</sup> See generally, Green, *supra* n.11; Parks, *supra* n.7; Eckhardt *supra* n.5; C.N. Crowe, “Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution”, (1995) 29 *U.Rich.L.R.* 191; I. Bantekas, “The Contemporary Law of Superior Responsibility” (1999) 93 *A.J.I.L.* 573; J.J. Paust, “My Lai and Vietnam: Norms, Myths and Leader Responsibility” (1972) 57 *Military L.R.* 99; T. Wu & Y-S. Kang, “Criminal Liability for the Actions of Subordinates: The Doctrine of Command Responsibility and its Analogues in United States Law (1997) 38 *Harv. I.L.J.* 272.

<sup>115</sup> On the interpretation of this, see *infra*. p.308.

<sup>116</sup> *Celebici*, *supra* n.7, paras 344-400.

<sup>117</sup> See for example, the *Aleksovski*, *supra* n.5, para 72; *Prosecutor v Kayishema & Ruzindana*, Judgment, 21 May 1999, ICTR-95-1-T, para 209; *Prosecutor v Blaskic*, Judgment, 3 March 2000, IT-95-14-T, para 294.

<sup>118</sup> Nuremberg IMT Judgment, *supra* n.28, pp.293.

<sup>119</sup> *Ibid.* p.333. W.J. Fenrick, “Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia” (1995) 6 *Duke J.C. & I.L.* 103, p.112 claims this was as the degree of participation of those on trial was clear and they did not need to go to negative criminality. Some German war criminals were held responsible under this head though. See Green, *supra* n.11, pp.333-335; See also the *Abbaye Ardenne* Case 4 L.R.T.W.C. 97. Green, *ibid.* p.341 seems to consider that they were based on the customary law of war, although they differed in standard.



accepted command responsibility in some form attached),<sup>120</sup> but it also imposed liability on civilian officials under this head, which was at least at the time, uncharted territory.<sup>121</sup> Until 1977, the development of the principle of command responsibility was primarily by jurisprudence, not all of which was reconcilable.<sup>122</sup> There have been various attempts to rationalise the judgments, in particular on the mental element. The most elaborate of those preceding the formation of the UN tribunals, that of Major Parks,<sup>123</sup> concluded that the requisite mental element was present if the commander “failed to exercise the means available to him to learn of the offence and under the circumstances, he should have known and such failure to know constitutes criminal dereliction”.<sup>124</sup> This statement has now received judicial confirmation.<sup>125</sup> 1977 saw the adoption of API,<sup>126</sup> which provided, in Articles 86-87 for command responsibility, which some writers consider customary in at least some respects.<sup>127</sup>

Article 86(2) reads, “[t]he fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach”.

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<sup>120</sup> *Supra* n.92, pp.48,443-48,445. Although even this was not uncontroversial, Pal was highly dubious of such an offence, keeping liability very narrow (pp.1,124-1,127), and Röling differed on its conditions of application (*ibid.*, pp.54-61). Parks is quite clear that some such offence did exist prior to 1945, although there were only a few instances of implementation, WH Parks, *supra* n.7, pp.2-20, On the Tokyo Trial here, see Parks, *ibid.* pp.62-69. At the very least, it can be traced to Article 1 of the Hague Rules. The 1919 Commission accepted the principle (*supra* n.17, pp.441-442), (although the Japanese members dissented on this), *ibid.*, pp.467.

<sup>121</sup> *Ibid.* See Fenrick, *supra* n.119, pp.117-118.

<sup>122</sup> For discussion of this case law (of which the most (in)famous is the *Yamashita* case, which was one of the first cases to expressly turn on the doctrine), see Parks, *supra* n.7, pp.22-77; Lippman, *supra* n.15, pp.77-83. See also *Celbici*, *supra* n.7, paras 359-378.

<sup>123</sup> *Supra* n.7.

<sup>124</sup> *Ibid.*, p.90.

<sup>125</sup> *Blaskic*, *supra* n.117, para 322.

<sup>126</sup> Protocol I Additional to the Geneva Conventions of 8 August 1949 and Relating to the Protection of Victims in International Armed Conflict, 1125 UNTS 3.

<sup>127</sup> See *Celbici*, *supra* n.7, paras 340-341, 390-393. Fenrick, *supra* n.119, p.119. Jia, though does not seem to think that this is the position, B.B. Jia, “The Doctrine of Command Responsibility in International Law” (1998) 65 *N.I.L.R.* 325, pp.346-347. The Trial Chamber in *Blaskic*, *supra* n.117, para 324 considered that the mental element was not custom, if it was thought that the mental element included the requirement that there be specific information in the possession of the accused.

This has to be read together with Article 87(1), which requires commanders “with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol”.<sup>128</sup>

The ICTY Statute, in a formulation differing from Articles 86-87 API,<sup>129</sup> deals with command responsibility in Article 7(3).<sup>130</sup> This states that “the fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts and had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish perpetrators thereof”.

As Fenrick says, this provision is unhelpfully worded,<sup>131</sup> and leaves many of its terms undefined,<sup>132</sup> (which, of course leaves resolution of the controversies to the court). The approach of the ICTY has been to treat it as having imported the customary law on the subject into its jurisdiction, thus giving it the right to determine what that is.<sup>133</sup>

The Rome Statute is far more verbose (but not necessarily the worse for it). Article 28 is controlling on the ICC, imposing liability on:

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<sup>128</sup> On the requirement that they be read together see Y. Sandoz (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1986) p.1011. This has been expressly adopted by the ICTY in *Blaskic*, *ibid.*, para 329, as has their comment (*ibid.* p.1022) that this “obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted to them, and to take the necessary measures for this purpose”. Bantekas, *supra* n.114, p.589 agrees that the provisions must be read together, and that this was the intent of the Conference drafting API.

<sup>129</sup> See H. Levie, “The Statute of the International Tribunal for Former Yugoslavia: A Comparison With the Past and a Look at the Future” (1995) 21 *Syracuse J.I.L. & Commerce* 1, p.13, who claims it comes closer to the stand taken in the *Yamashita* case as it uses the formula “knew or had reason to know” rather than Article 86(2) “knew, or had information which should have enabled them to conclude in the circumstances at the time”. The latter may be a more stringent test. The ICTY has interpreted Article 7(3) of its Statute to require possession of information which would put the superior on notice of crimes, *Celbici*, *supra* n.7, paras 383, 393, but see now *Blaskic*, *supra* n.117.

<sup>130</sup> The ICTR Statute’s Article 6(3) is to all intents and purposes identical.

<sup>131</sup> Fenrick, *supra* n.127, p.111. See also Bassiouni & Manikas, *supra* n.1, p.344 who note that it does not elaborate the actual test.

<sup>132</sup> *Ibid.* p.112.

<sup>133</sup> Fenrick, *ibid.*, p.123 appears to adopt this view. See also the ICTY in *Celbici* *supra* n.7, para 390-393. Its interpretation of the information required, is that it need not show offences were occurring, or were about to, but merely enough to put the commander on notice that something was happening, i.e. it “indicated the need



“1. A military commander or person effectively acting as a military commander...[is responsible for crimes]... committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces where:

(a) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(b) That military commander or person failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution”

2. With respect to superior and subordinate relationships not described in paragraph 1,...[such superiors are liable for crimes]... committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such forces where:

(a) The superior either knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior and;

(c) The superior failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”<sup>134</sup>

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for additional investigation in order to ascertain whether offences were being committed or about to be committed” (*Ibid.*, para 393), is not as broad as the preferable standard in *Blaskic* which is in line the official ICRC commentary.

<sup>134</sup> See generally, W.J. Fenrick, “Article 28” in Triffterer (ed.), *supra* n.40, 515; Saland, *supra* n.51 pp.202-204.

A difference in wording, at least for military leaders, is the formulation of the Rome Statute of the knowledge requirement, which requires that the defendant “knew, or, owing to the circumstances at the time, should have known” of existing or imminent violations. This removes the express requirement of having “had information which should have enabled them to conclude” that appeared to be present in API, but which *Blaskic* interpreted insofar as it represented custom as inferring that “if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be committed, such lack of knowledge cannot be held against him. However taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties”.<sup>135</sup> The Trial Chamber did this by reading the two provisions of API (Articles 86 & 87), which is substantially the right approach.

In another respect though there could be a significant addition to the requirements entirely unwarranted by customary international law. The Rome Statute contains the qualifying phrase that the superior is responsible for crimes only where they are committed “as a result of his or her failure to exercise control properly over such forces.” It is possible that this could be interpreted as the introduction of a causation requirement, the existence of which was expressly rejected by the ICTY in *Celebici*,<sup>136</sup> as it makes a

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<sup>135</sup> *Blaskic*, *supra* n.117, para 332. This formulation appears highly satisfactory, with one exception, the level of negligence is probably higher, at gross negligence. Bantekas’ (pre *Blaskic*) comment is still relevant, we are dealing with very serious crimes, thus negligence *simpliciter* should not suffice, Bantekas, *supra* n.114, p.590.

<sup>136</sup> *Supra* n.7, para 398, the Trial Chamber note that the only assertion of such a requirement by any academic had been by Bassiouni, *ibid*. Relying on *Celebici* Bantekas asserts that there is a requirement of causation. *supra* n.114, pp.592-594. With respect, this is based on a misunderstanding of *Celebici*, which is admittedly rather badly phrased. In para 399 the Chamber states, after rejecting causation, “this is not to say that, conceptually, the principle of causality is without application in the doctrine of command responsibility insofar as it relates to the responsibility of superiors for their failure to prevent the crimes of their subordinates. If fact, recognition of a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior’s failure to take the measures within his powers to prevent them. In this situation, the superior may be considered to be causally linked to the offences, in that but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed.” The Chamber would appear to be postulating a requirement of causation, but it was not. The Chamber was making the (rather trite) observation that if the superior had lived up to his responsibilities, the subordinates would not have been able to commit the crimes. This is in accordance with the next paragraph, (400) which reads “the very existence of the principle of superior responsibility for failure to punish, therefore, recognised under Article 7(3) and customary law, demonstrates the absence of a requirement of causality as a separate element of the doctrine of superior responsibility” The Chamber did not differentiate the two, and thus denied the element for both.



nonsense of liability under command responsibility for failure to punish offences.<sup>137</sup> Here the Rome Statute runs directly contrary to existing law.<sup>138</sup>

The final problem relates to the separate provision for civilian superiors. This has been a matter of debate for a long time, as there has been little authority on the matter.<sup>139</sup> It has been generally accepted that civilian superiors can come under the concept,<sup>140</sup> but the extent of control that they need to exercise and the standard to which they are to be held has been a matter of controversy. Both of these have recently been central in the *Celebici* Case. In *Celebici* the Trial Chamber determined that civilians could be liable under the principle, but only when they “exercise a degree of control over their subordinates which is similar to that of military commanders”.<sup>141</sup> This is probably the same standard as is elucidated in the Rome Statute, as both *de facto* military and non-military commanders are under the requirement of their having “effective authority and control”. To ensure this, for civilian superiors to become liable, the crimes must concern “activities that were within the effective responsibility and control of the superior”. Despite the requirements of the superior/subordinate relationship being at least as onerous as for military personnel, the *mens rea* requirement for civilian is different. Whereas military commanders are responsible if they “knew or, in the circumstances, should have known”, civilians are only responsible if they “knew, or consciously disregarded information which clearly indicated” crimes had been, or were about to be, committed. This runs counter not only to common sense, but also to the finding in *Celebici* (and contained in the UN Tribunal Statutes) that once the qualifications to become subject to the standard are complete,

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This is borne out by the failure of the Trial Chambers to apply such a condition in the *Celebici* case or the *Blaskic* case. G. Vetter, “Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)” (2000) 25 *Yale J.I.L.* 89, p.119 claims that the Trial Chamber hedged its bets a little in paragraph 399. It appears, since the Chamber in *Celebici* did not apply any such element, that it merely expressed itself infelicitously.

<sup>137</sup> *Ibid.* para 399.

<sup>138</sup> For another formulation see the *UK Manual of Military Law* (London: HMSO, 1958) para 631.

<sup>139</sup> It is true that the Tokyo IMT did make some findings in that respect, (*supra* n.120) but the contours of the opinion have not been taken up, in particular the liability of “departmental officials”.

<sup>140</sup> See *Celebici*, *supra* n.7, paras 356-363 and the cases cited therein.

<sup>141</sup> *Ibid.* para 378. It supported this by noting this was the approach taken by the ILC in the 1996 Draft Code.

then the *mens rea* standard is the same.<sup>142</sup> Another retreat from the requirements of customary international law can be seen here.<sup>143</sup>

## CONCLUDING REMARKS

Principles of liability, including defences are an interesting aspect of the jurisdiction of international tribunals. For a long time, they have been shamefully overlooked, and treated as secondary to definitions of crimes. This is odd, as they are part of the same overall process, that of determining criminality. As can be seen, similar policies come into play in this aspect of liability definitions as do in the definition of crimes *simpliciter*.

For both the Nuremberg and Tokyo IMTs, their Charters did not deal with the question fully. The only assertions related to the creation of a legally insupportable liability for conspiracy (which later passed into customary law), and denying the defences liable to be raised.<sup>144</sup> When it came to the UN Tribunals, the silence of the two IMT's Charters meant that there was little that the Secretary General (or OLA) who drafted the ICTY Statute (which the ICTR Statute follows) could do without being seen as legislating new law. That did not need to be a problem however, as the problems were expressly left to the ICTY, who could (and would have to) create a body of principles of liability. The controversies on international criminal liability were left to the Court. The Security Council was happy to allow this to occur, and leave the power in the ICTY to do this, probably as none of the States on the Security Council thought themselves to be likely to come under the mandate of the Tribunal. Up until this time, and due to the absence of international legal instruments dealing with the issue of liability, the law was basically only

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<sup>142</sup> *Ibid.* paras 379-393.

<sup>143</sup> This has also been discovered, independently, by Vetter, *supra* n.136, pp.123-124. Saland, diplomatically refers to this part of the article as "debatable", *supra* n.61, p.204. Fenrick, *supra* n.134, p.521 also notes it is a higher standard.

<sup>144</sup> The best thing that can be said for the exclusion of the superior orders defence was that the defence would probably have been inapplicable even if correctly formulated according to international law. Most, if not all of the defendants were convicted of either giving orders, or following ones which were not only manifestly unlawful, but they knew were unlawful.



existent in general principles and custom that had not been studied to any extent. In this respect, the granting of the power to determine this law to the UN Tribunals gave the law another form of legitimacy. As Franck notes, if a law is, in itself vague, legitimacy is not denied to it if there is “judicially supplied process determinacy”,<sup>145</sup> i.e. a court which is authorised to authoritatively determine what the law actually is. In this way then, the ICTY and ICTR, despite having Statutes which are generally less determinative of issues than may be ideal, are not totally inadequate.

When the Rome Statute came to be drafted, no such sanguine view of a court’s competence was taken by States, who insisted on defining the law themselves.<sup>146</sup> In this way, the law did become more clearly determinate, but along the way lost coverage in some places. The definitions of previously existing principles are quite consistently wider where defences are involved,<sup>147</sup> and narrower on inculpatory doctrines, at times in manifest contradiction to existing international law. This is because not only were States far more unwilling to grant the ICC any legislative power over themselves, but also were prepared to accept a lowest common denominator approach towards the principles.

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<sup>145</sup> T. Franck, *The Power of Legitimacy Among Nations* (Oxford: OUP, 1990) p.64.

<sup>146</sup> Leaving only Article 30(3) where the ICC can create defences in custom, which serves to exculpate an accused.

<sup>147</sup> Although these are now subject to Article 30(2).

# CONCLUSIONS: TOWARDS A NEW INTERNATIONAL CRIMINAL ORDER?

As concluding remarks have been made at the end of each chapter, this conclusion will be confined to more general comments, in which an evaluation will be given of the extent to which an effective and credible integrated system for the prosecution of international crimes has been created, and the extent to which the values underpinning international crimes have been adopted within the international system.

Back in the 1970s, there were confident assertions of another form of global justice, albeit of a distributive, rather than corrective, nature. This was the declaration of the “New International Economic Order” associated with General Assembly Resolution 3821 (XXIX).<sup>1</sup> This was intended to redress the imbalance between developed and developing States, in particular by creating obligations on developed States to grant development aid to developing States. Due to the opposition of several developed States, the programme never moved beyond the realm of rhetoric and soft law.<sup>2</sup> Is this the future which awaits the incipient system of international criminal law? A tentative response of “no” is warranted, and this conclusion will attempt to show why, although it will also sound notes of caution.

The modern system of international criminal law is, at the most, around a century old, beginning with the Hague Conferences, and, in particular the Hague Regulations. In that time, massive progress has been made towards accepting that there is a body of substantive international criminal law. After World War I, the Commission on the Responsibility of the Authors of the War and on Enforcement accepted that for war crimes, punishment was possible. However, this acceptance remained unsupported by

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<sup>1</sup> (1974) 13 *I.L.M.* 715.

<sup>2</sup> See A. Cassese, *International Law in a Divided World* (Oxford: Clarendon, 1986) pp.366-367.



international action. The only trials at the end of the war were the notorious Liepzig trials, and some rather pointless *in absentia* proceedings by the UK. The real history of international criminal law began after WWII, and is often a history of institutions. The Nuremberg and Tokyo IMTs, despite not being models for international co-operation in criminal law enforcement, as they were integrated for enforcement purposes into the occupation regimes of Germany and Japan, are the institutional beginnings of this history. Nonetheless, the Nuremberg IMT, if not its Tokyo sibling, gave rise to a body of international criminal law accepted fairly promptly as customary, and gave rise to the universalist ideas of international criminal law which continue to this day. Of course, the Allies, were clothing the selective enforcement of the law in the language of universals, and international criminal law. What is important though is that they did do so. If the Allies had chosen to deal with the Nazis by a summary execution, or even by national proceedings, then international crimes as we currently understand them may not have moved forwards at all since 1919. The law they used to convict the defendants in the Nuremberg and Tokyo IMTs was, with the exception of the charges based on war crimes, innovative and reactive. Yet few would deny the importance of having such laws. Those laws also conflicted with sovereignty. The idea which lay behind crimes against humanity was that there are certain activities which are so egregious, the principle of sovereignty must give way, and international law must step in, even when the behaviour is directed against a State's own citizens.<sup>3</sup>

The Cold War put an end to any attempt to internationalise enforcement of international criminal law, although, particularly in the aftermath of the *Eichmann* case,<sup>4</sup> there was an increasing acceptance of universal jurisdiction in theory, if not supported by sufficient practice to assert that the exercise of such jurisdiction was mandatory outside of particular treaty based duties to prosecute. States were unlikely to respond well to

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<sup>3</sup> The implications of this, and some of the contradictions which arise between this and crimes against peace are discussed at length in David Luban, *Legal Modernism* (Ann Arbor: University of Michigan Press, 1994) chapter 7.

<sup>4</sup> (1961) 36 *I.L.R.* 5, 277.

exercises of such jurisdiction over their nationals, and it was the glue of the universal condemnation of Nazism that held international criminal law together. Actions, such as the abduction of *Eichmann* and the irregular rendition of Klaus Barbie to France, also showed the limits of the bilateral system in enforcement of international crimes.

The tide began to turn in the 1980s, when common law jurisdictions such as the UK, Australia and Canada began to investigate alleged Nazi war criminals in their territories, and prosecutions in France of Vichy officials for crimes against humanity began to come to fruition. Prosecutions still remained selective concentrating almost entirely on Nazis, the prosecution of whom no State would take as insulting to its dignity. Up until this time amnesties were also still many States' responses to offences by their own officials. Examples include the French in Algeria and Indochina or the Military *juntas* in South America. The raising of the idea of an international criminal court in 1989 was a separate development to the prosecutions of Nazis as it was initially intended as a forum for the trial of drug smugglers, who were often as powerful and influential as the governments who sought to prosecute them. The abortive calls for prosecution in the aftermath of the Gulf War showed that there was still insufficient support for international action.

The two developments (international criminal law and the idea of an international criminal court) joined hands in 1993, when the Security Council decided to set up the ICTY in lieu of intervening to forcibly halt the atrocities that were ongoing in Yugoslavia at the time. The motives of the Security Council may not have been pure, but as with the Allies at Nuremberg, the turn to international criminal law itself was important. The States in the Security Council may not have believed in the universal enforcement of international criminal law, but spoke as if they did, and in determining that atrocities were a threat to international peace and security,<sup>5</sup> began the process of proper integration of the values into the international system. The Security Council did this by characterising violations of international criminal law as threats to the international system and thus as a



matter for collective international action. The extraordinary powers granted to the Security Council in the aftermath of WWII allowed the Council to grant wide-ranging powers to the ICTY, enabling it to completely break with the traditional bilateral system for co-operation in criminal matters, recognising that it would be inadequate, not least as it is optional, and some of the States whose co-operation was most needed would be likely not to exercise their option to co-operate.<sup>6</sup> Even if they did, they would be likely to try to evade transfer of their nationals by the manipulation of the extradition process, so extradition law limits to surrender were determined to be inapplicable. The traditional, bilateral mechanism was completely rejected as an inadequate response to the international crimes in former Yugoslavia.

The ICTY was open to some charges of selectivity, in that it was an *ad hoc* response to a single conflict, and the Security Council's actions highlighted its silence on other atrocities. The universal nature of international criminal law was at odds with such piecemeal enforcement. A chance to refute these arguments came with the creation of the ICTR, which shows the momentum created by international criminal tribunals. This momentum is also in evidence in the national prosecutions that have occurred of offenders from former Yugoslavia and Rwanda. Despite the creation of the ICTR, selectivity was still present, the ICTR, no less than the ICTY was a limited, reactive response to atrocities. The tension between the universal nature of the law espoused and the limited primary jurisdiction, was part of the reason for the increased support for the creation of a permanent international criminal court. Another explanation for the increased support for such a body is that by their existence and operation, the two UN Tribunals demonstrated that international criminal law could be enforced at the international level. The momentum they achieved led, in part, to the adoption of the Rome Statute with only seven negative votes in July 1998.

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<sup>5</sup> On this process see R. Cryer "The Security Council and Article 39: A Threat to Coherence?" (1996) 1 *J.A.C.L.* 161, pp181-182.

<sup>6</sup> This underlies the necessity of the Security Council imposing a duty to co-operate on States, see the Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, S/3754, para 20.

With the Rome Statute, sovereign concerns reasserted themselves in several ways. First, this time, an interim position between the bilateral regime of co-operation and the supranational system was created. Although most of the bars to extradition are removed, there are still impediments to transfer, such as diplomatic immunities or immunities deriving from agreements between States.<sup>7</sup> This last limitation was a large concession to States, and could easily lead to *de facto* selective application of the law even amongst States party to the Rome Statute. The exclusion of a duty to hand over sensitive information privileges States, possibly at the expense of prosecutions before the Court. Also the parameters of liability are more limited than those in customary law. This contraction of liability is a result of States taking a different view on the scope of the Court's powers to declare the law when that law was likely to apply to them than they have done when the law is to be applied to the practices of others. Examples of this are not merely related to the limitation of the rules on collateral damage, but include the insistence of some Middle Eastern States that indirect transfer of a population into an occupied territory be included in the Statute,<sup>8</sup> but that any possibility of liability for the recruitment of children into the *Intifada* be excluded. Similar comments can be made about the definitions of defences and the principles of liability.<sup>9</sup>

As a treaty-based regime, the Rome Statute only imposes obligations to co-operate on States party, and it does not impose any duty upon them to co-operate *inter se*. The Court can only exercise nationality and territorial jurisdiction on behalf of its States party, unless the Security Council decides to refer a situation to it, so the Court will not have universal

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<sup>7</sup> The national analogue to this is the acceptance that State immunity does not attach to international crimes, which accepts that in certain circumstances, sovereignty gives way to the need to enforce international criminal law, but that diplomatic and head of State immunity remains to prevent enforcement against diplomats and current heads of State. In the latter case, sovereignty wins out over the imperatives of enforcement.

<sup>8</sup> Although this is a war crime in customary international law, it was clearly directed at Israeli practices, see chapter 5, p.269-270.

<sup>9</sup> It must be remembered that codification is not always a positive development in an area of international law. See R.R. Baxter, "The Effects of Ill Conceived Codification and Development of International Law" in Institut Universitaire de Hautes Études Internationales, Geneve (ed.), *Recueil d'Études de Droit International en Hommage à Paul Guggenheim* (Geneva: in Institut Universitaire de Hautes Études Internationales, Geneve, 1968) 146; H.W.A. Thirlway, *International Customary Law and Codification* (Leyden: Sitjhoff, 1972) chapter 9; a more sanguine view is given by K. Wolfke, "Can Codification of International Law be Harmful?" in J. Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague: Martinus Nijhoff, 1984) 313.



coverage. Proposals for universal jurisdiction were defeated in Rome. The role of the Security Council in passing a matter to the ICC, and more obviously, its role in “deferring” prosecutions could, and are likely to, lead to assertions of selectivity, which are likely to continue to plague the enforcement of international criminal law.

On the positive side, the ICC is the first institution created to exercise jurisdiction over the States that bring it into being.<sup>10</sup> The creation of the UN tribunals and the Rome Statute in the 1990s heralded a huge upsurge in interest in international criminal law, and it is now an aspect of international law that States cannot afford to ignore. The rising numbers of prosecutions of offences from Rwanda and former Yugoslavia in national jurisdictions shows how the creation of an international criminal tribunal legitimises international interest in prosecution of these offences (as evidenced by the Nuremberg IMT also). This shows an increasing acceptance of the values of international criminal law, as it is on all fours with Simma’s understanding of the acceptance of a value (see *supra* p.10). When this is taken together with the creation of the Rome Statute, which, its flaws notwithstanding, represents a leap forward in the enforcement of international criminal law we can see that the enforcement of international criminal law is likely to achieve its historically greatest level, and purely because this will not be entirely universal we should not reject it entirely. The turn to international criminal tribunals may also have led to a swing towards enforcement of international crimes on a more universal basis at the national level. The *Pinochet* and *Habre* cases are examples of this as is the increasing trend away from amnesties, and the increasing extent to which they are to be scrutinised, if not outlawed. At the international level the increasing likelihood of mixed national/international tribunals in Cambodia and Sierra Leone<sup>11</sup> show that international criminal law enforcement is maintaining vitality. As the Rome Statute in particular creates a powerful national interest in prosecution of international crimes, an increased level of

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<sup>10</sup> The ICTR, of course, was created at the request of Rwanda, but their wish was for it to prosecute the old Hutu regime, not the new government for its activities as the RPF. The RPF actions, although at times rising to the level of international crimes, are in no way comparable to those of the Hutu interim government it overthrew.

national enforcement may be postulated, at least for States party to the Rome Statute. As national enforcement mechanisms, when dealing with offences by their own officials, have the advantages of being integrated into a State's enforcement regime, considerable benefits append to this approach.

This national interest will come about as a result of the complementarity regime, which emphasises the tandem relationship between national and international criminal tribunals. Primacy, as it exists in the relationship between national jurisdictions and the ICTY and ICTR has several advantages. The power the two Tribunals have to take a case effectively when they want it, means that when important questions of law or particularly egregious offences committed by a high level government officials, which may be more appropriately tried at the international level, arise the UN Tribunals can take them at will. This may not be the case with the ICC, although the lack of enforcement of the UN Tribunals' orders by the Security Council means in practice, the difference in practice may not be as wide as might be thought.<sup>12</sup> The advantages of the 'vertical' cooperation regime they enjoy compared to the more 'horizontal' approach taken by the drafters of the Rome Statute have been canvassed in chapter 2.

Despite these advantages, complementarity has advantages over primacy which go some way towards offsetting the attractions of primacy. Importantly, complementarity puts the focus on national prosecutions of international crimes. National prosecutions not only benefit from the prosecuting State's enforcement mechanisms, but have other advantages. International criminal tribunals cannot prosecute all the international crimes committed in the World, practical constraints militate in favour of the involvement of national courts. Also, justice at the international level may appear too abstract to the victims in the States where the atrocities have occurred. National courts may appear more

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<sup>11</sup> See now Security Council Resolution 1315, UN Doc. S/RES/1315, which mandates the Secretary General to negotiate an agreement with Sierra Leone for such a Tribunal.

<sup>12</sup> This argument is the theme of Bartram Brown, "Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals" (1998) 23 *Yale J.I.L.* 383.



legitimate to such victims.<sup>13</sup> Complementarity, by focusing on national prosecutions serves an important function in emphasising to States that prosecution of international crimes is their concern, whereas primacy can give the impression that international crimes should be prosecuted by “someone else”, i.e. international criminal courts. This focus, in addition to the fact that States will not wish to have international crimes committed by their nationals prosecuted in a very public forum (the ICC) gives, for the first time, a strong reason for a State to prosecute international crimes diligently.<sup>14</sup> By prosecuting international crimes occurring on their territories or by their nationals themselves, States can avoid transfer of proceedings to the ICC, and the embarrassment a trial before the ICC will engender. At the same time, the existence of the Rome Statute and the ICC serves to further vindicate the international interest in international crimes, and may already have had a spill over effect, leading to a greater level of prosecution of international crimes in general.

Support for the Rome Statute is wide; 112 States have signed the Rome Statute.<sup>15</sup> But it is not universal. The United States is, in its most sanguine moments, antipathetic to the Rome Statute, and its hostility to the ICC, should it materialise, could yet serve to break the Court. On the other hand, the unanimous support for the Rome Statute in the EU shows that powerful groups of States are prepared to put their weight behind the court. This justifies a very cautious optimism that, in the words of E.P. Thompson, though “the law may be rhetoric... it need not be empty rhetoric”.<sup>16</sup> By turning to the law, States have become caught up in the logic of that law, and the gap between the universal ideas underlying international criminal law and the practice surrounding their enforcement is beginning to narrow. Thus we are tottering towards an integrated system where national

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<sup>13</sup> For a lengthy argument to this effect see J. Alvarez, “Crimes of Hate/Crimes of State: Lessons From Rwanda” (1999) 23 *Yale J.I.L.* 365.

<sup>14</sup> Even treaty based duties to extradite or prosecute have remained honoured primarily in the breach, as often there has been insufficient reason for upholding the duties in the face of countervailing arguments in favour of benign neglect.

<sup>15</sup> Ratifications currently stand at 20 (15 September 2000), but this lower number is referable, partially, to the length of time taken to get the complex implementing legislation through national legislatures.

<sup>16</sup> E.P. Thompson, *Whigs and Hunters* (Harmondsworth: Penguin, 1990 (1975)) p.263.

and international courts both operate in tandem to prosecute international crimes.<sup>17</sup> The system may not be completely effective, and not totally credible because of its selectivity, but we have some cause for optimism. In distinction to a decade ago, we have institutions dedicated to enforcing international criminal law, and we can see the beginnings of such a system.

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<sup>17</sup> The latter operating where the former are “unwilling or unable” to prosecute suspects themselves.



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